100465

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 963

THE OLIVER AMERICAN TRADING COMPANY, INC.,
PLAINTIFF IN ERROR,

vs.

THE GOVERNMENT OF THE UNITED STATES OF MEXICO
AND NATIONAL RAILWAYS OF MEXICO

TO THE CIRCUIT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF NEW YORK

(29,972)

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No. 662

THE OLIVER AMERICAN TRADING COMPANY, INC., PLAINTIFF IN ERROR,

vs.

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IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 25, 1924

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[fol. 1] **UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK**

THE OLIVER AMERICAN TRADING COMPANY, INC., Plaintiff,

against

THE GOVERNMENT OF THE UNITED STATES OF MEXICO and NATIONAL RAILWAYS OF MEXICO, Defendants

ORDER DISMISSING CAUSE—Filed October 29, 1923

On motion of Hardin & Hess, Esqs., protesting to the jurisdiction of this honorable court, appearing specially and not otherwise for the defendant, The Government of the United States of Mexico, and contesting the validity of the summons herein, and the jurisdiction of this court both over the cause of action and over the person of said defendant, an order having been heretofore made herein requiring the plaintiff to show cause why the above-entitled action should not be dismissed upon the ground that The Government of the United States of Mexico is an independent foreign sovereign nation and is, therefore, immune from process of the courts except upon its consent, and why the attachment and levies made under the attachment herein should not be vacated and set aside; and,

The said matter having duly come on to be heard before me, and upon reading and filing the aforesaid order to show cause dated the 12th day of January, 1923, the affidavit of Carlos R. Felix, verified the 12th day of January, 1923, and annexed thereto, the affidavit of Gunther R. Lessing, verified the same day and also annexed thereto, and the affidavit of Jerome S. Hess, Esq., verified on the same day and also annexed thereto, the affidavit of Francisco P. De Hoyos, [fol. 2] Esq., verified the 6th day of February, 1923, the affidavit of Gunther R. Lessing, Esq., verified the 15th day of February, 1923, and the affidavit of Jerome S. Hess, Esq., verified the 5th day of March, 1923, in support of said motion, and the affidavit of Howard T. Oliver, Esq., verified the 23rd day of January, 1923, the affidavit of Howard T. Oliver, Esq., verified the 13th day of February, 1923, the affidavit of Alfred Hayes, Esq., verified the 26th day of February, 1923, the affidavit of Howard T. Oliver, Esq., verified the 11th day of June, 1923, the affidavit of Alfred Hayes, Esq., verified the 12th day of June, 1923, the affidavit of Howard T. Oliver, Esq., verified the 18th day of September, 1923, and the affidavit of Howard T. Oliver, Esq., verified the 10th day of October, 1923, in opposition thereto; and upon reading and filing the exhibits attached to said affidavits, the summons with notice herein, the certificates of service of said summons with notice by the Sheriff of New York County, the statement of Hon. Harry M. Daugherty, Attorney General of the United States, made by the direction of the Department of State as to the relations of the Government of the United States with the Government of the United States of Mexico; the order of

Hon. Arthur S. Tompkins, one of the Justices of the Supreme Court of the State of New York, and the affidavit of Jerome S. Hess, Esq., verified November 4, 1922, attached thereto; and upon all proceedings herein and on reading the record upon the removal of this cause from the Supreme Court, Rockland County, to this court, the stipulation herein dated January 4, 1923, extending the time of the defendants herein, and the order of Hon. John C. Knox thereon, the notice of motion of Van Vorst, Marshall & Smith, Esqs., returnable January 19, 1923; the opinion herein of Hon. John C. Knox, District Judge, dated April 6, 1923; the order herein of Hon. John [fol. 3] C. Knox, District Judge, dated April 20, 1923; and the opinion herein of Hon. John C. Knox, District Judge, dated October 11, 1923; all the foregoing having been heretofore filed herein; and it appearing to the court that said National Railways of Mexico is the direct operation by the Government of the United States of Mexico of a system of railways and is part of said Government; and after hearing Jerome S. Hess, Esq., of counsel herein appearing specially on behalf of the Government of the United States of Mexico and objecting to the jurisdiction of this court, in support of said motion, and Godfrey Goldmark, Esq., and Alfred Hayes, Esq., James A. Reed, Esq., and Robert F. Greacen, Esq., of counsel, for the plaintiff, in opposition thereto, and due deliberation having been had; and on motion of Hardin & Hess, Esqs., attorneys for the Government of the United States of Mexico, appearing herein specially solely for the purpose of this application and protesting the jurisdiction of this court and urging the immunity of said Government of the United States of Mexico as a friendly foreign sovereign from this action and process herein, it is

Ordered that the above-entitled action be and the same hereby is dismissed with $167.50 *Dollars* costs and disbursements to be paid to the defendant, the Government of the United States of Mexico, by the plaintiff and that the attachment heretofore granted herein be and the same hereby is vacated and any levy made thereunder be and the same hereby is vacated; and the funds and property of the Government of the United States of Mexico be and the same hereby are released from levy under said warrant of attachment and the Sheriff of the County of New York is hereby directed to return [fol. 4] the said property to said Government of the United States of Mexico.

Jno. C. Knox, U. S. D. J.

[fol. 5] [File endorsement omitted.]

[fol. 6] NEW YORK SUPREME COURT, ROCKLAND COUNTY

[Title omitted]

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
County of New York, ss:

Louis Russell, being duly sworn, deposes and says: that he is now and at all the times hereinafter mentioned was over the age of twenty-one years; that on the 8th day of November, 1922, at about 5.45 p. m. he served the annexed notice, petition and bond in accordance with the provisions of law, for removal to the United States District Court for the Southern District of New York, upon Zabriskie, Sage, Gray & Todd, attorneys for the plaintiff herein, by delivering to and leaving with Karl G. Kolish, the clerk in the office of said Zabriskie, Sage, Gray & Todd, true copies thereof, the said Karl G. Kolish being the person in charge of the said office of Zabriskie, Sage, Gray & Todd, no one of the members of the said firm being in at the time upon whom service could be made, and the said Karl G. Kolish being in charge of the said office in their absence.

Deponent further states that he made the said service of the said notice, petition and bond for removal to the United States District Court for the Southern District of New York on behalf of the defendants, the Government of the United States of Mexico, National Railways of Mexico and National Railways of Mexico (Government Administration.)

Louis Russell.

Sworn to before me this 9th day of November, 1922. Harriette C. Poloubet, Notary Public, New York County. County Clerk's No. 232. Register No. 4223. Commission expires March 30, 1924.

[fol. 7] SUPREME COURT,
Rockland County:

[Title omitted]

NOTICE OF REMOVAL

To the above-named plaintiff and Messrs. Zabriskie, Sage, Kerr & Gray, its attorneys:

You and each of you will please take notice that on Friday, November 10th, 1922, at the hour of 10 a. m. the defendant, National Railways of Mexico, will file in the above-named Court its petition and bond as required by law, together with the like peti-

tion and bond of the defendant, the Government of the United States of Mexico, for the removal of said cause from the above-entitled Court to the District Court of the United States for the Southern District of New York, and also a bond in the sum of Five hundred dollars given on such removal according to law and the requirements of the statute in such case made and provided, and copies of said bond and petition are herewith served upon you, and upon the filing of said petition and bond the defendants will present and call to the attention of the said Supreme Court of the State of New York the said petitions and bonds and move the said Court at Special Term thereof, to be held at the Courthouse of said Court at White Plains in the County of Westchester, New York, at the time hereinbefore stated, for removal of said action from said Supreme Court of the State of New York to the said District Court of the [fol. 8] United States for the Southern District of New York, and that the said motion for removal is upon the grounds stated in said petitions, and upon said petitions and bonds so filed and presented.

Dated, New York, November 8, 1922.

Van Vorst, Marshall & Smith, Attorneys, Appearing Specially for Defendant National Railways of Mexico for the Sole Purpose of Presenting the said Petition for Removal. Office & Post Office Address, 25 Broad Street, Borough of Manhattan, New York City.

[fol. 9] SUPREME COURT, COUNTY OF ROCKLAND

[Title omitted]

NOTICE OF SPECIAL APPEARANCE

We hereby enter the appearance of the defendant, National Railways of Mexico, in the above entitled cause by us as its attorneys, limited to the purpose of presenting a petition for the removal of said cause to the United States District Court, Southern District of New York.

Dated, New York, November 8, 1922.

Van Vorst, Marshall & Smith, Attorneys, Appearing Specially for Defendant National Railways of Mexico. Office & Post Office Address, 25 Broad Street, Borough of Manhattan, New York City.

[fol. 10] SUPREME COURT, COUNTY OF ROCKLAND

[Title omitted]

PETITION FOR REMOVAL

To the Supreme Court of the State of New York:

The Petition of the National Railways of Mexico (Ferrocarriles Nacionales de Mexico), appearing herein specially solely for the purpose of this application, respectfully shows to this Court:

First. The petitioner is one of the defendants named in this action and has not been served with the summons or complaint herein. The plaintiff has, as this petitioner is informed by its co-defendant named herein, the Government of the United States of Mexico, caused the summons herein to be served on Carlos R. Felix, Esq., the Financial Agent of the United States of Mexico in New York, and upon Francisco de Hoyos, Esq., the General Agent of the Mexican National Railways (Government Administration) in New York, and its said co-defendant, the Government of the United States of Mexico intends to file coincidently with the filing of this petition its petition for a removal of this Cause to the District Court of the United States for the Southern District of New York, to which petition so to be filed herein by the Government of the [fol. 11] United States of Mexico this petitioner respectfully refers and asks that it be treated as a part of this application.

Second. From affidavits filed in this action by or on behalf of the above named plaintiff it appears that this suit is brought by plaintiff to recover of said defendants the sum of upwards of Three thousand dollars for alleged breach of contract, and is wholly of a civil nature and that the matter and amount in dispute in said suit exceeds exclusive of interest and costs the sum or value of $3,000—all of which will more fully appear by the affidavits filed in said suit and by the said petition of the Government of the United States of Mexico, which are hereby referred to and made a part hereof.

Third. The defendant, National Railways of Mexico, the petitioner herein, was at the time of the commencement of such suit and still is an alien and a nonresident of the State of New York, and was then and still is a corporation duly incorporated under and by virtue of the laws of the United States of Mexico. The defendant, the Government of the United States of Mexico is and was at the time of the commencement of such suit, a sovereign state and a non-resident of the said State of New York. The plaintiff, as your petitioner is informed and verily believes—such information being derived from the affidavits heretofore filed in this action on behalf of said plaintiff—is and was at the time of the commencement of this suit a corporation duly organized and existing under and by virtue of the laws of the State of Delaware and is a resident of said State of Delaware.

[fol. 12] Fourth. The time within which said defendant, National Railways of Mexico, is required by the laws of the State of New York and the rules of practice in this Court, to answer or plead in this action has not yet expired, and, as your petitioner is informed and verily believes, the time of all of the defendants named in the summons herein to appear, answer or plead has been extended by order of this Court to the 28th day of November, 1922.

Fifth. The said National Railways of Mexico appears specially herein solely for the purpose of making this petition for removal and without conceding the jurisdiction of the Court, and files herewith a bond with good and sufficient surety in the sum of Five hundred dollars conditioned on its entering in the United States District Court for the Southern District of New York within thirty days of the date of the filing of this petition a copy of the record in this suit and for paying all costs which may be awarded by said District Court if said District Court shall hold that this action was wrongfully removed.

Wherefore this defendant prays this Court to proceed no further herein except to accept this petition and said bond and the like petition and bond of its said co-defendant, the Government of the United States of Mexico, and to permit the defendants to enter and file a copy of the record herein with the said United States District Court for the Southern District of New York, as provided by law.

National Railways of Mexico, by (Sgd.) E. E. Bashford, Vice-President, Petitioner. Van Vorst, Marshall & Smith, Attorneys, Appearing Specially for the Purpose of Presenting This Petition.

[fol. 13] Jurat showing the foregoing was duly sworn to by E. E. Bashford, omitted in printing.

[fol. 14] [File endorsement omitted.]

[fol. 15] Bond for Costs on Removal—Omitted in printing

[fol. 16] State of New York,
County of New York, ss:

I, S. Frank Hedges, Attorney-in-fact of the United States Fidelity and Guaranty Company, have compared the foregoing resolution with the original thereof, as recorded in the minute book of the said Company and do hereby certify that the same is a true and correct transcript therefrom, and of the whole of said original resolution.

Given under my hand and the seal of the Company, at the City of New York, this 8th day of November, 1922.

S. Frank Hedges, Attorney-in-fact.

[fol. 17] At this point the Record includes a further copy of the affidavit of service of Louis Russell, verified November 9, 1922, appearing heretofore in this Record.

[fol. 18] NEW YORK SUPREME COURT, ROCKLAND COUNTY

[Title omitted]

NOTICE OF PRESENTATION OF PETITION TO REMOVE CASE TO THE UNITED STATES DISTRICT COURT

To Zabriskie, Sage, Gray & Todd, attorneys for plaintiff.

SIRS: You are hereby notified that on Friday, the 10th day of November, 1922, at the hour of ten o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, the above named defendant, The Government of the United States of Mexico, appearing specially solely for that purpose, will file in this Court at Special Term thereof to be held in and for the County of Westchester, its petition and the bond as required by law for the removal of the said above entitled case from this Court to the District Court of the United States for the Southern District of New York, and will present said petition for such removal and a bond in the penal sum of Five hundred dollars ($500.00) given on such removal according to law and the requirements of the statutes in such case made and provided, to a Justice of this Court then sitting in such Special Term held in and for the County of Westchester, at the County Court House in the City of White Plains, copies of which bond and petition are hereto annexed, and will call the same to the attention of the said [fol. 19] Justice and move the said Court for the removal of said action from this Court to the United States District Court for the Southern District of New York.

Dated, New York, November 8, 1922.

Yours, etc., Hardin & Hess, Attorneys for Defendant The Government of the United States of Mexico, Appearing Specially Solely for the Purpose of That Application. Office and Post Office Address, 50 Pine Street, Manhattan, New York City.

[fol. 20] SUPREME COURT, ROCKLAND COUNTY

[Title omitted]

PETITION

To the Justices of the New York Supreme Court:

The petition of the Government of the United States of Mexico, being one of the Defendants herein, appearing herein specially solely

for the purpose of this application and not appearing generally herein, and protesting the jurisdiction of this Court, respectfully shows and represents to this Honorable Court:

First. The Petitioner is one of the Defendants named in this action, which is a suit of a civil nature, and the matter and amount in dispute in this case exceeds the sum and value of Three Thousand Dollars ($3,000.00), exclusive of interest and costs.

Second. Said suit or controversy is wholly between a citizen of one of the United States, to wit: of the State of Delaware, and aliens, to wit: the Government of the United States of Mexico, which is a sovereign state, and National Railways of Mexico, a citizen of the United States of Mexico, to wit: a corporation organized and exist- [fol. 21] ing under the laws of said United States of Mexico.

Third. At the time of the commencement of the above-entitled action, as appears from the affidavit of Howard T. Oliver, President of Plaintiff, verified the 17th day of October, 1922, to obtain a warrant of attachment herein, a copy of which is hereto annexed and made a part of this petition, the Plaintiff, The Oliver American Trading Company, Inc., was a corporation duly organized and existing under and by virtue of the laws of the State of Delaware; the Defendant the Government of the United States of Mexico was a de facto government and the Defendant National Railways of Mexico was a corporation organized under the laws of the Republic of Mexico; on or about December 4, 1921, the Executive of the United States of Mexico by decree duly issued, took over all the property of National Railways of Mexico and the administration thereof; said possession, operation and administration has continued to the present time; the entire business of Defendant National Railways of Mexico was and is transacted by the United States of Mexico under the title of "National Railways of Mexico (Government Administration)."

Fourth. Both of the Defendants named herein were at the time of the commencement of this action, non-residents of the State of New York.

Fifth. Plaintiff has caused the summons herein to be served on Carlos R. Felix, the Financial Agent of the United States of Mexico in New York, and upon Francisco P. de Hoyos, the General Agent of the Mexican National Railways (Government Administration) in New York.

[fol. 22] Sixth. The summons served as aforesaid contains a notice that in the event of Defendants' failure to appear or answer herein, judgment will be taken for the sum of $1,164,348.90 and interest.

As appears by said affidavit of Oliver, a copy of which is hereto annexed and made a part hereof, the alleged cause of action herein is upon certain claims, demands and causes of action against the above-named Defendants and each of them for the recovery of a sum of money only as damages for the breach of several express and implied contracts, based upon facts as alleged in said affidavit as follows:

"Prior to January, 1921, Plaintiff was engaged among other things, in transporting freight, partly for it- own account, and partly for others, over the railroad lines of Defendant National Railways of Mexico, administered by the Carranza and Obregon Governments as above described. In the transaction of its said business Plaintiff owned and held under lease various locomotives. It also had in use in Mexico large numbers of freight cars owned by American railroads. It had procured the use of these cars in Mexico by filing with the American owners thereof bonds for their safe return from Republic of Mexico to the United States. The bonds upon which Plaintiff was thus responsible were for upwards of $300,000, and entailed payments by Plaintiff of premiums on said bonds, insurance premiums, per diem charges, and incidental expenses amounting in the aggregate to large sums of money. The operations of Plaintiff in Mexico as aforesaid were conducted under certain operating con-[fol. 23] tracts with Defendants, the last dated January 1, 1920.

"On or about January 10, 1921, for good and valid considerations, an agreement in writing was entered into between Defendants and Plaintiff, wherein and whereby it was agreed that Defendants should pay to Plaintiff the sum of $5 pesos oro nacional, Mexican money, per day for each thousand pounds of tractive effort of each locomotive which Plaintiff then had or which it should thereafter place in service upon said railways for a period between February 1, 1921, and March 31, 1921. The parties upon the first of February, 1921, duly commenced the performance of said contract and continued the same to and including March 31, 1921, and thereafter by mutual consent.

"It was thereafter agreed between Defendants and Plaintiff that Plaintiff should collect and place to Defendant railways' credit in an account to be kept in the name of said railways, all sums due Defendants for freight carried upon trains drawn by Plaintiff's locomotives, and should charge Defendants in said account with all sums accruing to Plaintiff for rental for said locomotives under said contract.

"During the months of February, March, April, May, June and July, 1921, there accrued and became due from Defendants to Plaintiff, by way of rental under the above mentioned agreement, the sum of $156,010.70 pesos oro nacional, Mexican money. Plaintiff also, at Defendants' special instance and request, paid out for the purchase of oil, coal, etc. and repairs in connection with certain of its locomotives and cars used by Defendants, the sum of $15,889.28 [fol. 24] pesos oro nacional. Plaintiff overpaid in freight to Defendants the sum of $1,715.88 pesos oro nacional; it sold and delivered to Defendants a force pump at the agreed price and of the reasonable value of $225.32 pesos oro nacional; it also, at Defendants' special instance and request, performed services in and about the carriage of merchandise for one Dr. E. J. Dillon, of the reasonable value of $5,632.19 pesos oro nacional, which defendants promised and agreed to pay. In addition to the foregoing Defendants received $15,000 pesos oro nacional for certain locomotives returned by

Plaintiff to third persons, which said sum was Plaintiff's property. Defendants have paid Plaintiff of said sum only $8,602.40 pesos oro nacional, leaving due and payable the sum of $6,397.60 pesos oro nacional. For all the foregoing there is now due and owing from Defendants to Plaintiff the sum of $185,870.97 pesos oro nacional, or $92,935.48 in United States money.

"In addition to the foregoing, Plaintiff during 1921, had in Mexico in its possession certain railway freight cars belonging to various American railroads, to insure the safe return of which to said American railroads Plaintiff had given bond at the rate of about $2,000 per car. Plaintiff was also compelled to pay to the connecting American railroad companies, who were in turn responsible to the owner of the cars, a per diem charge of $5 United States of America money for each and every day that said cars should be out of the United States of America over ninety days. It was also Plaintiff's custom, when said cars were used in Mexico by persons other than Plaintiff, to charge a rental for the use thereof at the rate of $10 pesos oro nacional, Mexican money, or $5 per day United States of America money, per car, and if said cars were used by Plaintiff its [fol. 25] earnings therefrom would greatly exceed $5 per car per day in the United States of America money. On account of the scarcity of cars in Mexico all cars in Plaintiff's possession, when not in use by Plaintiff could be readily rented to others at the rate mentioned.

"During the years 1920 and 1921, Defendants, without the consent and over the protest of Plaintiff, took cars of Plaintiff from Plaintiff's possession as aforesaid and made use of the same for military, freight, postal, express and other similar purposes for a gross aggregate of 4807 days, wherefore Defendants became liable to pay to Plaintiff a reasonable per diem rental therefor, which said reasonable rental amounts to $5 per day per car United States money, or in the aggregate $24,035.

"During said period Plaintiff credited Defendants for sums due from Plaintiff for freight, per diem charges, etc. the sum of $197,363.76 pesos oro nacional, or $98,681.83 in United States money, leaving due to it by reason of the foregoing, the sum of $36,577.30 pesos oro nacional, or $18,388.65 United States money, which said sum is now due and owing from Defendants to Plaintiff. Due demand has been made for the payment of said sum, but Defendants have failed, neglected and refused to pay the same or any part thereof.

"On or about May 5, 1921, for good and valuable considerations, it was agreed by and between Plaintiff and Defendants that Defendants should continue the payment of rental at the rate above described for all Plaintiff's locomotives then operating in Mexico and for such additional locomotives up to 80 in number as Plaintiff should procure and put in operation. It was further agreed between the parties [fol. 26] that the freight collected by Plaintiff in the operation of trains drawn by said locomotives should be credited to the aforesaid railways' account and the rental debited thereto, and that the excess of freight earned over and above said rental should be applied to the

purchase of Plaintiff's locomotives, and that said rental contract should continue in full force and effect until all the locomotives then operated or thereafter operated by Plaintiff up to the number of eighty as aforesaid should have been purchased by Defendants.

"Plaintiff duly commenced performance of said contract on its part, and purchased and caused to be shipped to Mexico under the contract ten additional locomotives of a combined tractive effort of 233,300 pounds, which were put in use under the terms of said contract, and closed a contract with other parties for the purchase of seventy additional locomotives. Thereafter, on or about August 1, 1921, the Defendants wrongfully repudiated and attempted to cancel, and Defendant The Government of the United States of Mexico, wrongfully induced and compelled Defendant National Railways of Mexico to repudiate and to attempt to cancel said contract, and refused to carry out the same on their part, except until June 23, 1921, and deprived Plaintiff of the opportunity of earning the rental which had been agreed upon and of selling its locomotives as provided in said contract. Plaintiff has duly performed all the terms and conditions of the contract required by it to be performed, except as prevented by Defendants' repudiation thereof as aforesaid, and has continued ready, willing and able to perform said contract on its part at all times. By reason of said acts and defaults of Defendants [fol. 27] Plaintiff has lost and been deprived of the rental which would have accrued to it between August 1, 1921, and October 15, 1922, had Defendants carried out said contract, wherefore Plaintiff has suffered damage in the sum of $378,760.25.

"On or about September 3, 1921, Defendant The Government of the United States of Mexico illegally and wrongfully placed an embargo upon all Plaintiff's locomotives in Mexico, which prevented Plaintiff from removing any of said locomotives from Mexico. The Plaintiff thereupon appealed to the Mexican courts, which declared the embargo illegal and void, but in spite of the decision of the said Mexican Courts, the Defendant The Government of the United States of Mexico has wrongfully refused to release said embargo or to permit Plaintiff to remove said locomotives, and the same are now in Mexico subject to said embargo, and constantly depreciating by reason of non-use and lack of care and attention. Plaintiff has duly demanded of said Government that it release said embargo and deliver said locomotives to it, but said Government has failed, neglected and refused and continues to neglect and refuse to release said embargo or to return any of said locomotives to Plaintiff. Plaintiff now elects to consider the aforesaid acts of Defendant The Government of the United States of Mexico in embargoing said locomotives and its refusal to release said locomotives from the embargo as a sale thereof, and it demands of the Mexican Government the payment to it of the reasonable value of said locomotives. The fair and reasonable value [fol. 28] of said locomotives at the present time in Mexico is the sum of $317,300.

"In addition to the items of specific damage above enumerated, by reason of Defendants' wrongful repudiation of and refusal to carry out their contract with Plaintiff, whereby Plaintiff was forced to dis-

continue the profitable business theretofore conducted by it in Mexico with a resulting loss of its clientele, its credit and its goodwill, and to expend large sums of money in attempting to save its said business, Plaintiff has been damaged in the sum of $350,000."

From the foregoing, it clearly appears that the action is one at law for damages arising out of an alleged breach of contract, in which the amount in controversy is $1,164,348.90, exclusive of interest and costs.

Seventh. Petitioner further avers and shows that the time within which Defendants are required by the laws of the State of New York and the rules and practice of this Court to answer or plead in this suit has not expired nor has the same been extended by Court order, stipulation or otherwise, except that the time of Defendants to appear herein has been extended by Court order to the 28th day of November, 1922.

Eighth. Petitioner makes and files herewith a bond in the sum of Five Hundred Dollars ($500.00) with good and sufficient security for its entry in the District Court of the United States for the Southern District of New York, within thirty (30) days from the date of the filing of this petition, a certified copy of the record in this action, and for paying all costs that may be awarded by said District Court [fol. 29] of the United States if it shall hold that this action was wrongfully or improperly removed thereto.

Ninth. Defendant National Railways of Mexico by separate petition is making a similar application for the relief herein asked.

Wherefore said Defendant, appearing specially solely for that purpose prays this Court to proceed no further herein except to accept this petition herein and to make the order requiring the said Defendants to enter and file a copy of the record herein in the said District Court of the United States, as provided by law.

Dated November 8, 1922.

The Government of the United States of Mexico, by Carlos R. Felix, as Financial Agent of the Government of Mexico in New York. By Francisco P. de Hoyos, as General Agent of National Railways of Mexico (Government Administration). Hardin & Hess, Attorneys for Petitioner, Appearing Specially Solely for the Purpose of This Application. Office and Post Office Address, 50 Pine Street, Manhattan, New York City.

[fol. 30] SUPREME COURT, ROCKLAND COUNTY

[Title omitted]

AFFIDAVIT OF HOWARD T. OLIVER

STATE OF NEW YORK,
County of New York, ss:

Howard T. Oliver, being duly sworn, says:

I. He is and at all times herein mentioned was the President of The Oliver American Trading Company, Inc., plaintiff herein. Said The Oliver American Trading Company, Inc. is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware. It was organized on or about November 23, 1915, and since its organization, except as hereinafter stated, it has been engaged in the transaction of business in the United States of America and in the Republic of Mexico.

II. The defendant The Government of the United States of Mexico is and at all the times herein mentioned was a foreign corporation. It is a de facto government and has never been recognized by the United States of America. It has a place for the transaction of business within the State of New York in charge of a managing agent, and it now regularly transacts and for a long time heretofore it has regularly transacted business within this State. The defend- [fol. 31] ant, National Railways of Mexico, is and at all the times herein mentioned was a corporation organized and existing under and by virtue of the laws of the Republic of Mexico. Deponent cannot produce a certified copy of the Company's certificate of incorporation in proof of this allegation, for the reason that all the original documents connected with its organization are in the possession of the defendant, The Government of the United States of Mexico, in Mexico City. Deponent, however, knows that the National Railways of Mexico is a Mexican corporation from his residence of many years in Mexico and his personal business dealings with the company also extending over a number of years. In Moody's Manual of Railroads and Corporation Securities, a work of recognized authority on the subject, the company is stated to have been "incorporated in the City of Mexico, March 28, 1908, pursuant to a decree of the Federal Executive of Mexico, dated July 6, 1907, issued in accordance with a law of the Congress of Mexico, promulgated December 26, 1906."

III. Prior to 1914 defendant, National Railways of Mexico, owned and operated various railway lines within the territorial limits of the Republic of Mexico. In or about 1912, the President of The Republic of Mexico, one Francisco Madero, was assassinated and his government destroyed. Thereafter the country fell into a condition of anarchy, various parts thereof being under the control of military officers, each claiming to be the government of said Republic. Among these officers was one Venustiano Carranza, who was at the

head of a large military force and who took the title of First Chief. In course of time Carranza obtained control of most of Mexico and [fol. 32] eventually seized the capital, the City of Mexico, and there estabished his government, which was subsequently recognized by the United States of America as the de jure government of the Republic of Mexico.

On or about December 4, 1914, said Carranza issued a decree wherein and whereby, on behalf of the government or group represented by him, he seized and took over all the property of defendant National Railways of Mexico and the administration thereof. As he extended his power over Mexico he put his said decree into effect with the result that, at the time of his recognition by the United States of America, his government, through its officers and agents, was in actual possession of the property of said defendant railways, and carried on the administration and operation thereof.

During 1919 a military revolt against the government of said Carranza was commenced by one Alvaro Obregon, who had previously been one of the officers of the Carranza Government. Said revolutionary movement was successful, and on or about May 21, 1919, Carranza was killed, and thereafter Adolpho de la Huerta became Provisional President, and on January 1, 1920, Obregon became and he now is the President or chief administrative officer of the Government thus established and ever since existing in said country.

The Government of Obregon, after the overthrow of Carranza's said Government, took into its possession the property of defendant railways and continued the operation and administration thereof. Such possession, operation and administration by Obregon's said government has continued to the present time. The name of the cor- [fol. 33] porate entity, National Railways of Mexico, was used by said government in the operation and administration of defendant railways, but said corporation was and is virtually without property, insolvent and unable to transact business. The entire business of defendant railways was and is transacted by the said government, its officers and agents.

IV. Plaintiff has certain claims, demands and causes of action against the above named defendants and each of them for the recovery of a sum of money only as damages for the breach of several express and implied contracts, other than contracts to marry, and the said claims, demands and causes of action arise from and are based on the following facts:

V. Prior to January, 1921, plaintiff was engaged, among other things, in transporting freight, partly for its own account, and partly for others, over the railroad lines of defendant National Railways of Mexico, administered by the Carranza and Obregon Governments as above described. In the transaction of its said business plaintiff owned and held under lease various locomotives. It also had in use in Mexico large numbers of freight cars owned by American railroads. It had procured the use of these cars in Mexico by filing with the American owners thereof bonds for their safe return from Republic of Mexico to the United States. The bonds upon which

plaintiff was thus responsible were for upwards of $300,000, and entailed payments by plaintiff of premiums on said bonds, insurance premiums, per diem charges, and incidental expenses amounting in the aggregate to large sums of money. The operations of plaintiff in Mexico as aforesaid were conducted under certain operating contracts with defendants, the last dated January 1, 1920.

[fol. 34] VI. On or about January 10, 1921, for good and valid considerations, an agreement in writing was entered into between defendants and plaintiff, wherein and whereby it was agreed that defendants should pay to plaintiff the sum of $5 pesos oro nacional, Mexican money, per day for each thousand pounds of tractive effort of each locomotive which plaintiff then had or which it should thereafter place in service upon said railways for a period between February 1, 1921, and March 31, 1921. The parties upon the first of February, 1921, duly commenced the performance of said contract and continued the same to and including March 31, 1921, and thereafter by mutual consent.

It was thereafter agreed between defendants and plaintiff that plaintiff should collect and place to defendant railways' credit in an account to be kept in the name of said railways, all sums due defendants for freight carried upon trains drawn by plaintiff's locomotives, and should charge defendants in said account with all sums accruing to plaintiff for rental for said locomotives under said contract.

VII. During the months of February, March, April, May, June and July, 1921, there accrued and became due from defendants to plaintiff, by way of rental under the above mentioned agreement, the sum of $156,010.70 pesos oro nacional, Mexican money. Plaintiff also, at defendants' special instance and request, paid out for the purchase of oil, coal, etc., and repairs in connection with certain of its locomotives and cars used by defendants, the sum of $15,889.28 pesos oro nacional. Plaintiff overpaid in freight to defendants the sum of $1,715.88 pesos oro nacional; it sold and delivered to defendants a force pump at the agreed price and of the reasonable value of $225.32 [fol. 35] pesos oro nacional; it also, at defendants' special instance and request, performed services in and about the carriage of merchandise for one Dr. E. J. Dillon, of the reasonable value of $5,632.19 pesos oro nacional, which defendants promised and agreed to pay. In addition to the foregoing defendants received $15,000 pesos oro nacional for certain locomotives returned by plaintiff to third persons, which said sum was plaintiff's property. Defendants have paid plaintiff of said sum only $8,602.40 pesos oro nacional, leaving due and payable the sum of $6,397.60 pesos oro nacional. For all the foregoing there is now due nd owing from defendants to plaintiff the sum of $185,870.97 pesos oro nacional, or $92,935.48 in United States money.

VIII. In addition to the foregoing, plaintiff during 1921, had in Mexico in its possession certain railway freight cars belonging to various American railroads, to insure the safe return of which to said American railroads plaintiff had given bond at the rate of about

$2,000 per car. Plaintiff was also compelled to pay to the connecting American railroad companies, who were in turn responsible to the owner of the cars, a per diem charge of $5 United States of America money for each and every day that said cars should be out of the United States of America over ninety days. It was also plaintiff's custom, when said cars were used in Mexico by persons other than plaintiff, to charge a rental for the use thereof at the rate of $10 pesos oro nacional, Mexican money, or $5 per day United States of America money, per car, and if said cars were used by plaintiff its earnings therefrom would greatly exceed $5 per car per day in United States of America money. On account of the scarcity of cars in [fol. 36] Mexico all cars in plaintiff's possession, when not in use by plaintiff, could be readily rented to others at the rate mentioned.

During the years 1920 and 1921, defendants, without the consent and over the protest of plaintiff, took cars of plaintiff from plaintiff's possession as aforesaid and made use of the same for military, freight, postal, express and other similar purposes for a gross aggregate of 4807 days, wherefore defendants became liable to pay to plaintiff a reasonable per diem rental therefor, which said reasonable rental amounts to $5 per day per car United States money, or in the aggregate $24,035.

During said period plaintiff credited defendants for sums due from plaintiff for freight, per diem charges, etc., the sum of $197,363.76 pesos oro nacional, or $98,681.83 in United States money, leaving due to it by reason of the foregoing, the sum of $36,577.30 pesos oro nacional, or $18,288.65 United States money, which said sum is now due and owing from defendants to plaintiff. Due demand has been made for the payment of said sum, but defendants have failed, neglected and refused to pay the same or any part thereof.

IX. On or about May 5, 1921, for good and valuable considerations it was agreed by and between plaintiff and defendants that defendants should continue the payment of rental at the rate above described for all plaintiff's locomotives then operating in Mexico and for such additional locomotives up to 80 in number as plaintiff should procure and put in operation. It was further agreed between the parties that the freight collected by plaintiff in the operation of trains drawn by said locomotives should be credited to the aforesaid [fol. 37] railways' account and the rental debited thereto, and that the excess of freight earned over and above said rental should be applied to the purchase of plaintiff's locomotives, and that said rental contract should continue in full force and effect until all the locomotives then operated or thereafter operated by plaintiff up to the number of eighty as aforesaid should have been purchased by defendants.

X. Plaintiff duly commenced performance of said contract on its part, and purchased and caused to be shipped to Mexico under the contract ten additional locomotives of a combined tractive effort of 233,300 pounds, which were put in use under the terms of said contract, and closed a contract with other parties for the purchase of seventy additional locomotives. Thereafter, on or about August 1,

1921, the defendants wrongfully repudiated and attempted to cancel, and defendant the Government of the United States of Mexico, wrongfully induced and compelled defendant National Railways of Mexico to repudiate and to attempt to cancel said contract, and refused to carry out the same on their part, except until June 23, 1921, and deprived plaintiff of the opportunity of earning the rental which had been agreed upon and of selling its locomotives as provided in said contract. Plaintiff has duly performed all the terms and conditions of the contract required by it to be performed, except as prevented by defendants' repudiation thereof as aforesaid, and has continued ready, willing and able to perform said contract on its part at all times. By reason of said acts and defaults of defendants plaintiff has lost and been deprived of the rental which would have accrued to it between August 1, 1921 and October 15, 1922, had de-
[fol. 38] fendants carried out said contract, wherefore plaintiff has suffered damage in the sum of $378,760.25.

XI. On or about September 3, 1921, defendant the Government of the United States of Mexico illegally and wrongfully placed an embargo upon all plaintiff's locomotives in Mexico, which prevented plaintiff from removing any of said locomotives from Mexico. The plaintiff thereupon appealed to the Mexican courts, which declared the embargo illegal and void, but in spite of the decision of the said Mexican Courts, defendant the Government of the United States of Mexico has wrongfully refused to release said embargo or to permit plaintiff to remove said locomotives, and the same are now in Mexico subject to said embargo, and constantly depreciating by reason of non-use and lack of care and attention. Plaintiff has duly demanded of said government that it release said embargo and deliver said locomotives to it, but said government has failed, neglected and refused and continues to neglect and refuse to release said embargo or to return any of said locomotives to plaintiff. Plaintiff now elects to consider the aforesaid acts of defendant The Government of the United States of Mexico in embargoing said locomotives and its refusal to release said locomotives from the embargo as a sale thereof, and it demands of the Mexican Government the payment to it of the reasonable value of said locomotives. The fair and reasonable value of said locomotives at the present time in Mexico is the sum of $317,300.

XII. In addition to the items of specific damage above enumerated, by reason of defendants' wrongful repudiation of and refusal to carry out their contract with plaintiff, whereby plaintiff was forced to discontinue the profitable business theretofore conducted by it in
[fol. 39] Mexico, with a resulting loss of its clientele, its credit and its good-will, and to expend large sums of money in attempting to save its said business, plaintiff has been damaged in the sum of $350,000.

XIII. At all the times herein mentioned one peso oro nacional Mexican money was, and it now is of the value of fifty cents in money of the United States of America.

XIV. Plaintiff on account of defendants' defaults as set out above has sustained damages herein, and the defendants are justly and truly indebted to the plaintiff herein in the sum of $1,164,348.90, with interest, and plaintiff is justly entitled to recover from the defendants and each of them the said sum of $1,164,348.90 and interest as aforesaid over and above all counterclaims known to deponent.

XV. Plaintiff is about to begin an action on the claims, demands and causes of action hereinabove stated by issuing the summons hereto annexed, and the warrant of attachment herein is asked to accompany said summons.

XVI. That no previous application for a warrant of attachment has been made herein.

Howard T. Oliver.

Sworn to before me this 17th day of October, 1922. Peter F. Artusio, Notary Public, New York County, No. 78. (Seal.) Register No. 4004. Commission expires March 3, 1924.

[fol. 40] AFFIDAVIT OF CARLOS R. FELIX

STATE OF NEW YORK,
County of New York, ss:

Carlos R. Felix, being duly sworn, deposes and says:

I am the Financial Agent in New York for the Government of the United States of Mexico, the Petitioner named in the foregoing petion and the person upon whom, as such Financial Agent, the summons in this action was served.

I have read the foregoing petition and know the contents thereof and the same is true to my knowledge and belief except as to matters therein stated to be alleged upon information and belief and as to those matters I believe it to be true.

The reason why this verification is made by me and not by the defendant petitioner is that said petitioner is not an individual but is the Government of a friendly foreign sovereign nation and that the President of said Republic and all the Cabinet officers and department heads and other officers thereof are without the State of New York.

My knowledge as to the matters alleged in the petition is derived from the copy of the summons in this action served upon me, the writ of attachment and the affidavit of Howard T. Oliver, upon which the same was obtained, copies of which were served upon me, and from facts known to me by reason of my official position, by virtue of which official position I am authorized to make this verification.

Carlos R. Felix.

Sworn to before me this 8th day of November, 1922. Harriette O. Peloubet, Notary Public, New York County. County Clerk's No. 232. Register's No. 4223. Commission expires March 30, 1924.

[fol. 41] AFFIDAVIT OF FRANCISCO P. DE HOYOS

STATE OF NEW YORK,
County of New York, ss:

Francisco P. de Hoyos, being duly sworn, deposes and says:

I am the General Agent in New York for National Railways of Mexico (Government Administration) which is the title or name under which the Government of the United States of Mexico controls and operates its railway lines. I hold my office as such General Agent under and by appointment from the appropriate official of the Government of the United States of Mexico, of which Government I am an official. Said Government of the United States of Mexico, is the petitioner named in the foregoing petition and I am the person upon whom, as such General Agent of National Railways of Mexico (Government Administration) the summons in this action was served.

I have read the foregoing petition and know the contents thereof and the same is true to my knowledge and belief except as to matters therein stated to be alleged upon information and belief and as to those matters I believe it to be true.

The reason why this verification is made by me and not by the defendant petitioner is that said petitioner is not an individual but is the Government of a friendly foreign sovereign nation and that the President of said Republic and all the Cabinet officers and department heads and other officers thereof are without the State of New York.

My knowledge as to the matters alleged in the petition is derived from the copy of the summons in this action served upon me, the writ of attachment and the affidavit of Howard T. Oliver, upon [fol. 42] which the same was obtained, copies of which were served upon me, and from facts known to me by reason of my official position, by virtue of which official position I am authorized to make this verification.

Francisco P. de Hoyos.

Sworn to before me this 8th day of November, 1922. Harriette O. Peloubet, Notary Public, New York County. County Clerk's No. 232. Register's No. 4223. Commission expires March 30, 1924.

[fol. 43] [File endorsement omitted.]

[fols. 44 & 45] Bond on Removal for $500—Omitted in printing printing

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[fols. 46 & 47] Civil Practice Act—Section 907

National Security Company

Supreme Court, Rockland County

[Title omitted]

Undertaking on Attachment

The above named plaintiff having applied to one of the Justices of this Court for a warrant of attachment against the property of the above named defendants, The Government of the United States of Mexico, and National Railways of Mexico, under and by virtue of the Civil Practice Act—Article 54, on the ground that the said defendants are foreign corporations,

Now, therefore, the National Surety Company, having an office and principal place of business at 115 Broadway in the City of New York, does hereby undertake, that if the defendants The Government of the United States of Mexico, and National Railways of Mexico, recover judgment in this action, or if the warrant of attachment is vacated, the plaintiff will pay all costs which may be awarded to the said defendants, and all damages which the said defendants may sustain by reason of the said attachment, not exceeding the sum of Two Thousand ($2,000.00), dollars.

Dated, New York, October 17th, 1922.

National Surety Company, by F. O. Beattie, Resident Vice President. Attest: N. V. Tynan, Resident Assistant Secretary.

Copy of by-law omitted in printing.

[fol. 48] At this point the Record includes the affidavit of Howard T. Oliver verified October 17, 1922, appearing heretofore in this record.

CERTIFICATE OF ROCKLAND COUNTY CLERK

STATE OF NEW YORK,
Rockland County Clerk's Office, ss:

I, James W. Sherwood, clerk of said County, hereby certify that I have compared the foregoing copy of record on removal. The Oliver American Trading Co., Inc. vs. The Government of the United States of Mexico ano. with the original now filed in said office, and find the same to be a true and correct transcript therefrom and of the whole of such original.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of said County this 6th day of December, 1922.

J. W. Sherwood, Clerk. (Seal.)

[fol. 49] [File endorsement omitted.]

[fol. 50] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

NOTICE OF MOTION FOR ORDER VACATING WARRANT OF ATTACHMENT—Filed October 11, 1923

SIRS: Please take notice that upon the affidavit of Howard T. Oliver, sworn to the 17th day of October, 1922, upon which a certain warrant of attachment was granted herein by Mr. Justice Tompkins of the Supreme Court of the State of New York, the undersigned, appearing specially for defendant, National Railways of Mexico, for the purposes of this motion only, will move this Court at a part thereof held for the hearing of motions, on the 19th day of January, 1923, at 10 o'clock in the forenoon or so soon thereafter as counsel may be heard, for on order vacating said warrant of attachment as against the defendant, National Railways of Mexico, upon the following grounds:

1. That said affidavit upon which said warrant of attachment was granted does not state facts sufficient to constitute a cause of action against said defendant, National Railways of Mexico.

[fol. 51] 2. That the Supreme Court of the State of New York was without jurisdiction to grant said warrant of attachment as against the defendant, National Railways of Mexico, and this Court therefore is without jurisdiction to continue said warrant of attachment, because said affidavit upon which said warrant was granted, does not state the jurisdictional facts which must be stated in order to confer upon the Courts of the State of New York jurisdiction to entertain an action between two corporations foreign to the State of New York,

inasmuch as said affidavit fails to set forth facts sufficient to bring this action within any one of the four cases in which an action may be maintained between foreign corporations as provided in Section 47 of the General Corporation Law of the State of New York (formerly Section 1780 of the Code of Civil Procedure).

Yours, &c., Van Vorst, Marshall & Smith, Attorneys, Appearing Specially for Defendant National Railways of Mexico for the Sole Purpose of This Motion. Office & P. O. Address, 25 Broad Street, New York City. To Zabriskie, Sage, Kerr & Gray, Attorneys for Plaintiff, 49 Wall Street, New York City.

[fol. 52] [File endorsement omitted.]

[fol. 53] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

OPINION

KNOX, D. J.: In this action plaintiff concedes that National Railways of Mexico, a corporate entity, "incorporated in the city of Mexico, March 28, 1908," is not one of the defendants whose prop-
[fol. 54] erty was sought by the attachment issued in the State Court. Nevertheless, through a confusion, arising from the fact that the government now functioning in Mexico now operates the property formerly controlled by the said corporation, under the name, "National Railways of Mexico, Government Administration," certain funds of the corporation have been attached. That said funds, irrespective of the conclusions reached as to the immunity claimed by the Governments of the United States of Mexico, and as to the possibility of any liability of National Railways of Mexico, Government Administration, as distinct from the Government itself, should be released from seizure, is admitted on all sides.

The corporation asks that it be compensated out of plaintiff's undertaking for such damages and expenses as have been incurred through the seizure of its money. This, I shall not undertake to do. One reason is,—that the corporation was never served with process in this suit; the summons was served upon an officer of the United
[fol. 55] States of Mexico, who was in charge in this city of the office wherein business of the Government operated and controlled railway is transacted. Furthermore, it is impossible to say upon the papers before me whether in seizing the funds, the Sheriff, or the plaintiff, is responsible. A determination of that question will doubtless require the taking of testimony as to the instructions given by the plaintiff to the sheriff, as well as to other details.

An order releasing the corporation's funds from attachment may be presented.

All other questions in this suit are reserved for further consideration.

April 6, 1923.

——— ———, U. S. D. J.

[fol. 56] [File endorsement omitted.]

[fol. 57] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER RESETTLING ORDER RELEASING CERTAIN FUNDS—Filed April 20, 1923

On reading and filing notice of resettlement, dated April 19, 1923, with proof of service thereof upon Van Vorst, Marshall & Smith, attorneys appearing specially for the National Railways of Mexico, a corporation incorporated March 28, 1908, it is

Ordered, that the order heretofore entered herein on the 12th day of April, 1923, releasing certain funds from levy under attachment herein, be and the same hereby is resettled so as to read after the title thereof, as follows:

The National Railways of Mexico, a corporation incorporated March 28, 1908, as distinct from National Railways of Mexico, Government Administration, having appeared specially by Van Vorst, Marshall & Smith, its attorneys, and moved this court for an order to vacate as against it the warrant of attachment issued in this action on the ground that the affidavit upon which said warrant was issued does not state facts to constitute a cause of action against it and also that the court was without jurisdiction to grant such warrant of [fol. 58] attachment, now, on reading and filing said notice of motion and on reading the warrant of attachment and the affidavit of Howard T. Oliver, verified October 17, 1922, upon which said warrant of attachment was granted, and the further affidavits of Howard T. Oliver, verified the 23rd day of January, 1923, and the 13th day of February, 1923, submitted by the plaintiff upon the hearing of the motion and after hearing Alfred Hayes, Esq., of counsel for the plaintiff, and Wm. Mason Smith, Esq., of counsel for the said National Railways of Mexico, a corporation appearing specially, and it appearing to the court that no cause of action is stated against the said National Railways of Mexico, a corporation incorporated March 28, 1908, as distinct from the National Railways of Mexico, Government Administration, and it appearing to the court that the said National Railways of Mexico, a corporation incorporated March 28, 1908, is not a party defendant in this action, and that the funds certified to Hon. Percival E. Nagel, Sheriff of the County of New York, by amended return of the National City Bank to the warrant of attachment dated October 18, 1922, served upon said bank, are the property of the National Railways of Mexico, a corporation

incorporated March 28, 1908, which is not a defendant herein, and the plaintiff having disclaimed in open court that it was asserting any cause of action against the said National Railways of Mexico, a corporation incorporated March 28, 1908, and said plaintiff asserting that the defendant herein designated National Railways of Mexico is the National Railways of Mexico, administered by the Government, it is, on motion of Van Vorst, Marshall & Smith, appearing specially as aforesaid,

Ordered that the funds of National Railways of Mexico, a corporation incorporated March 28, 1908, not one of the defendants herein, [fol. 59] certified to Hon. Percival E. Nagel, Sheriff of the County of New York, by amended return of the National City Bank to the warrant of attachment dated October 18, 1922, served upon said bank, to have been in the possession of said bank when said warrant was served, he and they hereby are released from levy under said warrant of attachment and the Sheriff of the County of New York is hereby directed to pay said funds so certified by the National City Bank as aforesaid to said National Railways of Mexico, a corporation incorporated March 28, 1908, upon payment to the Sheriff of the County of New York of his fees thereon, if any, and it is

Further ordered, that this order is made without prejudice to any claim on the part of the said National Railways of Mexico, a corporation incorporated March 28, 1908, for compensation out of plaintiff's undertaking for such damages and expenses, if any, as it may have suffered.

Jno. C. Knox, J. U. S. D. C.

[fol. 60] [File endorsement omitted.]

[fol. 61] United States District Court, Southern District of New York

[Title omitted]

Order to Show Cause—Filed October 11, 1923

On the summons in this action and the annexed affidavits of Jerome S. Hess and Carlos R. Felix verified the 12th day of January, 1923, and upon the record filed herein and all the papers and proceedings heretofore had herein, and on motion of Hardin & Hess, protesting to the jurisdiction of this Honorable Court, appearing specially and not otherwise for the defendant, The Government of the United States of Mexico, for the purpose of securing this order and contesting the validity of the summons herein, and the jurisdiction of this Court, both over the cause of action and over the person of the said defendant, it is

Ordered, that the plaintiff or his attorneys show cause before this Court, or one of the judges thereof, at a term thereof to be held at

the Court House, Federal Building, Borough of Manhattan, New York City, on the 19th day of January, 1923, at ten o'clock in the forenoon thereof, or as soon thereafter as counsel can be heard, why the above entitled action should not be dismissed upon the ground that said defendant is a de facto government of an independent foreign sovereign nation, and, therefore, is immune from process of [fol. 62] the courts, except upon its consent, and the alleged service of the summons upon the said defendant should not be vacated and set aside upon the ground that the said service was not made in such a manner as to confer jurisdiction of this cause, and that the defendant has not been properly or regularly served herein, and why the attachment and the levies made under the attachment herein should not be vacated and set aside; due cause therefor appearing,

Further ordered that service of this order and said affidavits at or before twelve o'clock noon on the 13th day of January, 1923, shall be sufficient; due cause therefor appearing,

Further ordered that said defendant's time to appear or to make any motion with respect to the jurisdiction of this Court as to the cause of action herein, or to plead herein, be and the same hereby is extended until five days after the entry of an order upon this order to show cause.

Dated, New York, January 12th, 1923.

Jno. C. Knox, U. S. D. J.

[fol. 63] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF JEROME S. HESS—Filed October 11, 1923

Jerome S. Hess, being duly sworn deposes and says: He is an attorney duly admitted to practice in this Court, and a member of the firm of Hardin & Hess, which firm are the attorneys for the defendant, The Government of the United States of Mexico, and which firm appeared herein specially in the New York State Supreme Court, wherein this action was originally commenced, for the purpose of removing said action to this Court, and have not in any manner appeared generally herein. Said firm applies for the annexed order to show cause, appearing specially for that purpose, and for the purpose of contesting the jurisdiction of this Court and the validity of the service of the summons in this action upon said defendant, and has not and does not appear specially or generally in the action, nor waive any jurisdictional defects in the proceedings by which the plaintiff has sought to acquire jurisdiction of the defendant herein, nor waive any jurisdictional defects with regard to the cause of action alleged herein.

Plaintiff sought to commence this action in the New York Supreme [fol. 64] Court, Rockland County, by serving a summons upon one

Senor Don Carlos R. Felix, who is the Financial Agent of the Mexican Government in the City of New York, and by further serving a summons upon Senor Don Francisco P. De Hoyos, who is the Agent in the City of New York for the National Railways of Mexico Government Operation, which as appears by the affidavit of the plaintiff herein, upon which the attachment herein was granted, is owned and operated and is the sole property of the Government of the United States of Mexico, which is an independent sovereign foreign Nation. Said attempted service was made within the City of New York.

No complaint has been served in this action, but from the affidavit of Howard T. Oliver, President of the plaintiff, upon the application for a warrant of attachment, which affidavit was verified the 17th day of October, 1922, it appears that the plaintiff claims damages in the sum of $1,164,348.90 and interest. In said affidavit the plaintiff is alleged to be a corporation organized under the laws of Delaware and engaged in the transaction of business in the United States of America and in the Republic of Mexico, but is not specifically stated to be engaged in the transaction of business within the State of New York. Mr. Oliver further alleges that The Government of the United States of Mexico "is a de facto government and has never been recognized by the United States of America." He further alleges that the defendant, National Railways of Mexico, is a corporation organized under the laws of the Republic of Mexico, and which, prior to 1914, owned and operated various railway lines within the territorial limits of said Republic; that on or about December 4, 1914, [fol. 65] Venustiano Carranza, First Chief of the Constitutionalist Army, on behalf of the Government took over the property of the National Railways of Mexico and the administration thereof, and at the time of his recognition by the United States of America, his Government was in active possession of the property of said defendant Railways, and carried on the administration and operation thereof. It further alleges that the Government of the present President of The United States of Mexico, Alvaro Obregon, took into its possession the property of defendant Railways, and continued the operation and administration thereof down to the present time, using the name of the old corporate entity, National Railways of Mexico, and the entire business of defendant Railways was and is transacted by the said Government, its officers and agents.

Plaintiff then sets forth certain claims and alleged causes of action for the recovery of a certain sum of money only, alleging that prior to January, 1921, it was engaged in transporting freight for its own account and others over the railway lines of the National Railways of Mexico, and owned and held under lease various locomotives, and had in use in Mexico freight cars owned by American railroads. This was done under an operating contract with defendants, dated January 1, 1920. That on or about January 10, 1921, a contract was entered into between plaintiff and defendants whereby the defendants agreed to pay plaintiff the sum of $5.00 gold, Mexican, per day for each thousand pounds of tractive effort of each locomotive between February 1, 1921, and March 31, 1921,

and this agreement was continued thereafter by mutual consent, but no time of continuance is alleged. Mr. Oliver then admits that plaintiff collected and placed at defendant's credit sums due defendant for freight and charged against said account sums due for rental. [fol. 66] He then alleges certain items of collection and certain charges for oil, coal and repairs, etc., alleging a number of different complicated items, from which it is alleged, without any showing being properly made, that there is due and owing from defendants to plaintiff $92,935.48 United States money. This is clearly the result of some accounting of a fiduciary relationship existing between the parties, but there is no allegation that any balance was ever struck or any accounting had. The plaintiff then goes on and alleges that it had in 1921 in Mexico certain freight cars for which it was compelled to pay a per diem charge to the owner during the time said cars were in Mexico, and which it was accustomed to rent out to parties in Mexico; that the defendants took the cars from plaintiff's possession and converted the same, for which plaintiff claims a reasonable per diem rental amounting to $24,035.00 United States money. There is then alleged a further crediting and debiting between the parties as to which plaintiff claims a balance of account, amounting to $18,288.65 United States money. Plaintiff then alleges that on May 5, 1921, defendants agreed with it that the plaintiff should purchase certain locomotives, and those should be rented to the defendants; that it purchased certain locomotives, but that the defendants repudiated and attempted to cancel the agreement on August 1, 1921, and deprived the plaintiff of the opportunity of earning the rental, and also on September 3, 1921, placed an embargo upon all of plaintiff's locomotives and refused to release the embargo, and that plaintiff now elects to consider such act a sale of the locomotives to the defendants, and demands the reasonable value thereof in the sum of $317,300.00. Then there is a general allegation of loss of business, credit and good-will in the sum of $350,000.00. [fol. 67] From the facts herein it is respectfully submitted to this Honorable Court that under the authorities there is no jurisdiction over said defendant, the Government of the United States of Mexico, which is the de facto existing Government of a Friendly Independent Sovereign Nation.

The time within which, under the law and the rules of this Court, the defendant must appear herein, expires on the 13th day of January, 1923, and it is, therefore, necessary that the defendant have an order to show cause herein returnable on January 19, 1923, and may also have its time to appear or move herein extended until after the determination of this motion, and for this reason defendant asks an order to show cause, because there is not sufficient time to have this motion heard in the regular way before the expiration of said time. Deponent returned on the 11th day of January, 1923, from a trip to the Republic of Mexico, which he made for the purpose of conferring with the said defendant in regard to the cause of action alleged in the papers herein, and it is for that reason that this application could not previously be made. Deponent also asks that the order to show cause extend the time of the defendant to appear,

move or plead in this action until five days after the determination of the motion, and that meanwhile the plaintiff be restrained from any further proceedings herein.

It is respectfully called to the attention of this Honorable Court that all the proceedings and acts alleged in the affidavit of Howard T. Oliver took place in the Republic of Mexico and not within the State of New York. It, therefore, appears that said contract was not entered into, nor was it to be performed within the territory of the State of New York, nor did any of the acts recited in said affidavit [fol. 68] occur in the State of New York, but on the contrary it appears that said defendant is sued for an act of sovereignty within its own territories.

No other or further application has been made for an order to show cause herein, or for the relief asked herein.

Wherefore, deponent respectfully prays that the Court sign the annexed order requiring the plaintiff, or its attorneys, to show cause before this Court on the 19th day of January, 1923, why this action should not be dismissed and the attempted service of the summons herein and why the attachment heretofore granted herein and the levies under the attachment herein should not be vacated and set aside, and why this Court is not without jurisdiction over the defendants in this action, and further extending the time of the defendants to appear, move or plead herein until five days after the entry of an order upon the dtermination of said order to show cause and staying all proceedings upon the part of the plaintiff until the determination of such order to show cause or until a further order of this Court.

Jerome S. Hess.

Sworn to before me this 12th day of January, 1923. Harriette O. Peloubet, Notary Public, New York County. County Clerk's No. 232. Register's No. 4223. Commission expires March 30, 1924.

[fol. 69] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF CARLOS R. FELIX—Filed October 11, 1923

Carlos R. Felix, being duly sworn, deposes and says:

That he is the Financial Agent of the Mexican Government in New York; that he is familiar with the proceedings that have been had in the above-entitled action and has read the papers upon which the Writ of Attachment was granted, including the Affidavit of Howard T. Oliver verified the 17th day of October, 1922, upon which said Writ of Attachment was granted; that all of the transactions referred to in said Affidavit were done by the Government

of the United States of Mexico in the exercise of its sovereign power and within the territorial limits of the United States of Mexico.

That the United States of Mexico is an independent sovereign nation upon friendly and amicable terms with the United States of America and entitled to the privileges, immunities and rights of [fol. 70] an independent sovereign nation in accordance with the usages and practices of international custom; that the present government now functioning in the United States of Mexico is an actual de facto government maintaining order and exercising the ordinary and usual governmental functions throughout the United States of Mexico, and it is recognized as the government of the United States of Mexico by the peoples of that sovereign nation; that said government is an existing government, clothed with the power to enforce its authority within its own country, and is obeyed by the people over which it rules, and is capable of and is performing the duties and fulfilling the obligations of an independent power.

That said Government of the United States of Mexico has never appeared in this action nor submitted itself to the jurisdiction of this Court or to the New York Supreme Court, but has, on the contrary, continually protested the jurisdiction of said courts over its person and its property and continues to do so.

Carlos R. Felix.

Sworn to before me this 12th day of January, 1923. Harriette O. Peloubet, Notary Public, New York County. County Clerk's No. 232. Register's No. 4223. Commission expires March 30, 1924.

[fol. 71] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF GUNTHER R. LESSING—Filed October 11, 1923.

Gunther R. Lessing, being duly sworn, deposes and says: That he is an American citizen and duly admitted to practice at the Bar in the Federal Courts of the Districts of Texas, New Mexico and Illinois. That he is employed by the National Railways of Mexico, Government Administration, in the City of Mexico, Republic of Mexico, as attorney, and is now so employed, and resides at Amazones 16, in the City of Mexico aforesaid.

That as such attorney, it has been necessary for him, in the course of his professional duties, to examine into the administration of the Railways operated by the Government of Mexico in said Republic, and to familiarize himself with the legal consitution and administration of the same. That the National Railways of Mexico is now entirely operated, managed and controlled by the Government of Mexico itself, and that all persons having any relationship to or

concerned with the operation of said Railways are solely and exclusively and entirely employees of the Government of the United [fol. 72] States of Mexico, and have no relation or connection with the corporate entity known as the National Railways of Mexico, a corporation organized under the laws of the Republic of Mexico. That said National Railways of Mexico, the corporation, ceased to function in connection with the operation, management and control of the railroads of Mexico in 1914, when the same were taken over by the Government of President Carranza of Mexico, by Decree, and have remained in such control, operation and management of the Government of Mexico ever since that time, and so continues up to the date of the verification of this affidavit.

Gunther R. Lessing.

Sworn to before me this 12th day of January, 1923. Harriette O. Peloubet, Notary Public, New York County. County Clerk's No. 232. Register's No. 4223. Commission expires March 30, 1924.

[fol. 73] [File endorsement omitted.]

[fol. 74] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF HOWARD T. OLIVER—Filed October 11, 1923

Howard T. Oliver, being duly sworn, deposes and says as follows:

I am the President of the plaintiff corporation. The plaintiff corporation has an office for the transaction of business at #61 Broadway, in the Borough of Manhattan, City of New York. This office has been maintained by it since 1916. I am record owner of 97 out of the 100 shares of capital stock of the plaintiff and am the beneficiary owner of the other three shares. I have been the active head of the corporation since its organization in 1915. I myself have been engaged in the business in Mexico for about 15 years, the plaintiff corporation having been widely and favorably known through Mexico and having represented such firms as Dupont, International Harvester Company, Swift and others of equal standing. During revolutionary activities, the plaintiff corporation kept merchandise moving between the United States and Mexico and pro- [fol. 75] vided more American cars for use in Mexico than any other company. It operated up to as many as five freight trains a week with as many as 14 locomotives and cars from Texas to Mexico City.

I am a citizen of the United States, but in connection with the business of the plaintiff, spent part of every year in Mexico.

I am thoroughly familiar with the situation with respect of railroads in Mexico, as I am with general political conditions.

I am also fairly familiar with the activities of Mr. Carlos R. Felix, the financial agent of the Mexican Government in New York. Mr. Felix has a permanent office at #120 Broadway, New York City, which I have visited and upon the door of this office appears: "Financial Agency of the Mexican Government. Office hours 10 A. M. to 2 P. M. Sat. 10 A. M. to 12." Employed in said office are about 15 people. He is engaged in the payment and issuance of drafts both on New York and on Mexico, in the payment of bills as instructed by the Mexican Department of Finance, and otherwise carries out the instructions of the Mexican Government.

At the time of the commencement of this action the defendant, The Government of the United States of Mexico, did not have within the State of New York, a president, vice-president, treasurer, assistant treasurer, secretary or assistant secretary, or an officer performing corresponding functions under another name, except the said Carlos R. Felix. In fact, under the law of Mexico, any official [fol. 76] who functions there, upon leaving the country no longer represents Mexico in an official capacity unless he is specifically delegated to represent them in a foreign country, as is Mr. Felix. The office of Mr. Felix is a permanent one here in the City of New York, and through it he is conducting business of the defendant, The Government of the United States of Mexico, in the State of New York and within the Southern District of New York, and was doing so at the commencement of this action.

In connection with the question as to whether or not the Government of the United States of Mexico has been recognized by the United States of America, either as a de facto or de jure government, I annex hereto and make a part hereof, marked respectively "A" and "B," copies of two communications from the United States Secretary of State, addressed to the Governor of New York, from which it appears, that while the United States of Mexico has for many years been recognized as an international person, the defendant, The Government of the United States of Mexico has never been recognized by the government of the United States of America. The said copies of the State Department communications were furnished to me by Mr. Robert S. Conklin, Deputy Attorney General of the State of New York in charge of the New York office in October and November last. The levy upon the furniture at the consulate was released in pursuance of said request.

The Mexican Constitution of 1917, Article 82, provided:

"The President of the Republic shall have the following qualifications * * *.

"VII. He shall not have taken part directly or indirectly in any uprising, riot or military coup."

[fol. 77] As appears from the affidavit upon which the attachment was granted herein, the present de facto President Elvaro Obregon commenced a military revolt or military coup.

The foregoing translation of the Mexican constitution is contained in the supplement to the Annals of the American Academy of Politics and Social Science of May, 1917.

The National Railways of Mexico (administered by the Government), has an office in the City of New York in the Southern District of New York, in charge of Mr. Francisco P. De Hoyes, I have visited his office at #233 Broadway. The telephone book lists the office as follows:

"Natl. Railways of Mexico, Mex., Govt. Admn., genl. agcy., 233 Bway., Barclay 5481. Purchasing dept., 233 Bway., Barclay 5889."

From my connections with the Mexican railways situation, I know that Mr. de Hoyes negotiates contracts between American lines and American citizens and the National Railways of Mexico (administered by the Government); that in the same office, purchases for the National Railways are made, and that the general business of the railways in the United States is conducted from the said office in the Woolworth Building. M. de Hoyes has about 15 employees as such agent.

In addition to the foregoing office in control of the said de Hoyes, there is in the City of New York an office of the National Railways of Mexico at #25 Broad Street, which is the office of the corporate entity in this country. The corporate entity in this country is only maintained practically for the purpose of preserving its legal [fol. 78] status, but the assets of the corporation are in possession of the Mexican Government in Mexico and that government is in actual control of the corporation and operates the same as the National Railways of Mexico (administered by the government). I am unable to state the legal effect of such operation, and accordingly I have served the agent of the Mexican Government who represents the administration which is running the railroad. Whether or not such operation is binding upon the legal shell that is here in New York is not known at this time, but pursuant to Section 233 of the Civil Practice Act of the State of New York, the railroad corporation has been made a party-defendant through Mr. de Hoyes. If any property has been attached which belongs to the group which is maintaining the corporate shell as distinguished from any property which is in this city in the possession or under the control of Mr. de Hoyes, an employee of the Government of Mexico, I have no objection to the releasing of such property without prejudice to the other proceedings herein.

Howard T. Oliver.

Sworn to before me this 23rd day of January, 1923. John E. McGuirk, Notary Public, Bronx County, Clerk's No. 9. Register's No. 8. Certificate filed in New York Co. Clerk's No. 85. Register's No. 3079. Certificate filed in Kings County. Clerk's No. 7. Register's No. 3042. Commission expires March 30, 1923. (Seal of John E. McGuirk, Notary Public, Bronx County.)

[fol. 79] EXHIBIT "A" TO OLIVER'S AFFIDAVIT

Washington, D. C., October 27th, 1922.

To Honorable the Governor of New York, Albany, N. Y.:

The representative at this Capitol of the Federal Administration functioning in Mexico has advised the Department that the Oliver Trading Company, a Mexican corporation, has instituted suit against that administration in the Supreme Court of New York, Rockland County, and in connection therewith has attached the furniture, implements and funds of the Mexican Consular General and financial agency in New York City and also the property there of the International Railways of Mexico, which the Department understands is controlled by the Mexican Administration.

As you are doubtless aware the Government has not recognized the Central Administration in Mexico and moreover no exequatur has been granted to the person now acting as Mexican Consular General in New York. However, as you were advised in the Department letter of October 23rd, 1922, the Department has offered no objection to the performance by that person of the usual consular functions and it clearly appears that the exercise of such functions is essential in many ways to the carrying out of the commercial transactions between representatives of the two countries under generally accepted practice and principles of comity. The Consul may claim inviolability for the archives and official property of his office and their exemption from seizure or examination and the Department is of opinion that under existing circumstances [fol. 80] the person acting as Mexican Consular General in New York, even though he has received no exequatur, should in practice be accorded certain inviolability.

The Department would therefore appreciate very much if you could find it possible to direct a law officer of your State to take this matter up immediately with the Court in question with a view to prompt relief from attachment of official property of the Consulate General which, as the Department is informed, has been compelled by the attachment to suspend its functions. It may be that upon having this matter called to their attention the counsel for the Oliver Trading Company would consent to a lifting of the attachment to the extent indicated.

The matter is very seriously viewed by the Mexican Administration.

Please be so kind as to telegraph me promptly what action you have taken. The Department understands that attorneys for the Oliver Trading Company are Zabriskie, Sage, Kerr & Gray, 49 Wall Street.

(Signed) Charles E. Hughes, Secretary of State.

[fol. 81] EXHIBIT "B" TO OLIVER'S AFFIDAVIT

October 31, 1922.

The Honorable the Governor of New York, Albany (New York):

Reference Department's telegram October 27, concerning litigation instituted in New York Supreme Court, Rockland County, by Oliver Trading Company against Mexican authorities.

I beg to request that you will be so good as to ask a law officer of your State to appear before the court at a favorable opportunity to make the following statement upon the authority of the Department of State:

Quote. The Government of the United States has at present no official relations with the administration now functioning in Mexico. This fact, however, does not affect the recognition of the Mexican State itself, which for years has been recognized by the United States as an inner quote international person end inner quote, as that term is understood in international practice. The existing situation simply is that there is no official intercourse between the two States. End Quote.

(Signed) William Phillips, Acting Secretary of State.

[fol. 82] [File endorsement omitted.]

[fol. 83] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF FRANCISCO P. DE HOYOS—Filed October 11, 1923

Francisco P. De Hoyos, being duly sworn, deposes and says:

That he is the same person mentioned in the Affidavit of Howard T. Oliver, verified the 23rd day of January, 1923, and is an employee of the United States of Mexico; and that the Mexican Government operates its railways under the title "National Railways of Mexico" only in the Republic of Mexico and not elsewhere;

That from the time that said Railways were taken over by the Carranza Government in 1914 all of the property, funds and assets of the Railways became the property of the Government of Mexico and so continue; and said property has been operated, administered, and financed since that time by the Government of the United States of Mexico;

That referring to the Affidavit of Howard T. Oliver, verified the 23rd day of January, 1923, and the statement therein at the bottom [fol. 84] of page 4 with relation to the legal status of the National Railways of Mexico, the corporation, and in respect to its relationship to the Mexican Government, the same is as follows: That the

Mexican Government uses the name "National Railways of Mexico" with the designation thereafter "Government Administration." The said Government does not in any way use or control said corporation, National Railways of Mexico, in connection with its operation, but merely uses the name "National Railways of Mexico" for the purpose of convenience and because such name aptly illustrates the fact that the Railways are now being operated by the Government for national purposes, in the same way that the expression "United States Railroad Administration" was used in the United States; that the corporate entity, National Railways of Mexico, is an entirely independent organization and corporation and has not, since 1914, in any way been concerned or connected with the operation, management, control or disposition of the Railways, their affairs, finances or assets.

That at the office situated at No. 233 Broadway, Manhattan, New York City, no tickets for the transportation of passengers over said lines are sold, nor are any contracts for the carriage of freight made or bills of lading issued; and that Deponent performs no duties for said National Railways of Mexico, Government Administration, except upon instructions received from the office of said Government Administration in the City of Mexico; and that said office in New York is of mere incidental use for the convenience of the Government Administration in Mexico City.

[fol. 85] Deponent has been employed by the Government of Mexico in its operation of said Railways since 1914, and has acquired his knowledge as to the facts above set forth in the course of such employment.

F. P. De Hoyos, Francisco P. de Hoyos.

Sworn to before me this 6th day of February, 1923. Louis Russell, Notary Public, Kings County, No. 338. (Seal.) Certificate filed in New York County No. 527. Commission expires March 30, 1923.

[fol. 86] [File endorsement omitted.]

[fol. 87] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF HOWARD T. OLIVER—Filed October 11, 1923

Howard T. Oliver, being duly sworn, deposes and says, that he is the President of the plaintiff corporation. That contracts upon which this action was brought were made with Francisco Perez, as Director General of the National Railways of Mexico, and with other operating officials engaged in the government administration of the National Railways of Mexico. That all of the transactions upon which this suit was brought were had with the National Railways

of Mexico as administered by the government, which National Railways of Mexico has an office at 233 Broadway, Borough of Manhattan, City of New York, and of which Francisco P. de Hoyos is the Managing Agent in the City of New York.

That the defendant, The Government of the United States of Mexico, has served upon the plaintiff's attorney herein, an affidavit of Francisco P. de Hoyos, verified February 6, 1923, which contains the following statement:

"That from the time that said Railways were taken over by the Carranza Government in 1914 all of the property, funds and assets of the Railways became the property of the Government of Mexico and so continue; and said property has been operated, administered, and financed since that time by the Government of the United States of Mexico;"

[fol. 88] The Plaintiff's attorney herein, has received a letter from Wm. Mason Smith, a member of the firm of Van Vorst, Marshall & Smith, dated January 22, 1923, which contains the following statement with reference to this action:

"Mr. Francisco P. de Hoyos on whom I am informed your client caused the summons to be served, is not an agent or representative of my client but of the Government Administration of the Railways, and no service on him warrants any proceedings against my client."

That the National Railways of Mexico, having an office at 25 Broad Street, Borough of Manhattan, City of New York, a corporate shell of the corporation which formerly owned the franchises, property, funds and assets of the National Railways of Mexico, of which E. E. Bashford is a Vice-President, resident in the City of New York, is not a defendant in this action and has not been served with process herein, and that Van Vorst, Marshall & Smith, Esqs., appear specially for said corporation, having an office at 25 Broad Street, Borough of Manhattan, City of New York, and have no standing to make any motion for the vacating of attachment herein.

That the plaintiff does not intend to make service of the summons herein or to take judgment herein against the said National Railways of Mexico, having an office at 25 Broad Street, Borough of Manhattan, City of New York. That the plaintiff is informed and believes that the sum of $39,723.53, which the National City Bank has certified to the Sheriff of the County of New York, to be in its possession, is the property of the said National Railways of Mexico, the corporate shell of a corporation organized under the laws of Mexico, having an office at 25 Broad Street, Borough of Manhattan, City of New York. That said property is not the property of said National Railways of Mexico, having an office at 233 Broadway, Borough of Manhattan, City of New York, the defendant herein, [fol. 89] which now owns the complete body of franchises, property, funds and assets of the National Railways of Mexico, a corporation organized in 1908, and that the plaintiff has no objection to the said National Railways of Mexico, appearing specially herein by Van

Vorst, Marshall & Smith, Esqs., having an office at 25 Broad Street, Borough of Manhattan, City of New York, making a claim as third party to the said sum of $39,723.53, and will not oppose the releasing of the said sum to the said corporate shell called the National Railways of Mexico, having an office at 25 Broad Street, Borough of Manhattan, City of New York, upon such third party claim.

That attached hereto is a copy of the summons herein and the certificate of the Sheriff of the County of New York, of service thereof upon the defendant, The Government of the United States of Mexico, on October 18, 1922, by leaving the same with Carlos R. Felix, as the Managing Agent of said defendant, The Government of the United States of Mexico, and certificate of service on the National Railways of Mexico, on October 23, 1922, by leaving the same with Francisco P. de Hoyos, as the Managing Agent of said defendant, National Railways of Mexico.

That the attachment herein was levied upon certain property of Faustino Roel, Mexican Consul General in New York City, but that the plaintiff acceded to the request of the Secretary of State that it consent to the lifting of the attachment to the extent that it affected the official property of the Consulate General and the said levy was on motion of the plaintiff, vacated to such extent. There has been no other request or suggestion from the State Department that the attachment herein be vacated, or the levy thereof released, or the suit withdrawn, although the State Department is informed as to the pendency of this action.

Annexed hereto is a copy of telegram sent by Howard T. Oliver [fol. 90] to Albert B. Fall, Secretary of Interior, dated June 30, 1921; copy of telegram of Albert B. Fall to Howard T. Oliver, dated July 1, 1921; copy of letter George T. Summerlin, Charge d' Affairs, to Howard T. Oliver, dated July 5, 1921, and copy of letter, Howard T. Oliver to State Department, Washington, D. C., dated July 24, 1922. That the representatives of the Department of State, have most faithfully complied with the instructions, referred to in above mentioned correspondence, and have exercised great diligence to assist the plaintiff in any way to obtain justice in its case and have repeatedly asked deponent for suggestions as to the best course of action to be followed by them in rendering such assistance. In spite of such effort, which has been continuous from July 1, 1921, and still continues, no satisfactory relief has been obtained through their good offices.

That on the morning of January 20, 1923, the argument of the motions herein having been set for Tuesday, January 23, 1923, deponent learned through official channels of the State of New York, that for some unknown reason the official statement of the State Department, dated October 31, 1922, a copy of which is annexed to the affidavit of Howard T. Oliver, verified January 23, 1923, was no longer in the possession of the Deputy Attorney General of the State of New York, in the City of New York, and that there was therefore, no possibility of said statement being presented to the court upon the hearing of this motion. By reason of the great im-

portance of such statement to the plaintiff's case, plaintiff's attorney called by telephone the proper official of the State Department at Washington, D. C., at about one o'clock on Saturday, January 20, 1923, and informed said official of the disappearance from New York City, of said papers and the importance to the plaintiff's case of having a substituted copy presented without fail on Tuesday, January 23, 1923 at 2 P. M. The plaintiff's attorney was assured by said proper official of the State Department, that he need have no anxiety in the matter. That on Monday, January 22, 1923, a [fol. 91] further conversation was had with said official and deponent's attorney was informed that such statement would be presented by telegraphic instructions to the District Attorney of the United States. That at all times the plaintiff has been highly gratified by the active and sincere assistance and co-operation of the State Department in its behalf, thus showing the desire of the American Government to protect its citizens and their property in other parts of the world. Deponent desires the fact of such co-operation and assistance, to be matter of public record herein.

That the original return of the National City Bank made to the Sheriff of the County of New York upon the service of the attachment herein reported that it had no funds of the defendants herein.

That in an affidavit of Jerome S. Hess, while this action was pending in the Supreme Court, Rockland County, verified the 28th day of October, 1922, presented to Justice Robert F. Wagner, to secure the vacation of a order of examination herein, the said Jerome S. Hess, deposed as follows:

"That he is a member of the firm of Hardin & Hess, attorneys for the Defendants herein; that he makes this affidavit specially for the purposes of this application only and not appearing generally on behalf of Defendants, but denying specifically the jurisdiction of the Courts of New York State of the persons of Defendants and of the subject matter of the action; that he has had personal charge of the matters in relation to the attachment and the proceedings in relation thereto on behalf of such Defendants."

That it was not until the 28th day of November, 1922, that the National City Bank amended its return by reporting the possession of $39,723.53, the property of the National Railways of Mexico, above described as the corporate shell, having an office at 25 Broad Street, Borough of Manhattan, City of New York.

That apart from the property of the said Faustino Roel, who is in- [fol. 92] formal Consul General of Mexico in New York City, as to which property the levy of the attachment herein was voluntarily lifted by plaintiff, as aforesaid, no property has been returned as levied upon under the attachment herein except that which is specified in the verified certificate of Carlos R. Felix, as Financial Agent in New York of The Government of the United States of Mexico, dated October 25, 1922, a true and correct copy of which is hereto annexed, the verified certificate of Francisco P. de Hoyos, as General Agent of National Railways of Mexico and operated lines (Mexican

Government Administration), dated October 24, 1922, a true and correct copy of which is hereto annexed, and the amended return of the National City Bank, dated November 28, 1922, a true and correct copy of which is hereto annexed.

That annexed hereto is a true and correct copy of a letter from John J. Lyons, Secretary of State of the State of New York, to Messrs. Zabriskie, Sage, Gray & Todd, former attorneys of the plaintiff herein, dated October 23, 1922.

Howard T. Oliver.

Sworn to before me this 13th day of February, 1923. Samuel C. Whitman, Notary Public, Kings County. Kings County No. 172. (Seal.) Kings County Register's No. 4178. Certificate filed New York County No. 502. New York County Register's No. 4365. Commission expires March 30, 1924.

[fol. 93] SUPREME COURT, ROCKLAND COUNTY

[Title omitted]

SUMMONS, WITH NOTICE

To the above-named defendants:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer, or, if the complaint is not served with the summons, to serve a notice of appearance, on the Plaintiff's Attorneys within twenty days after the service of this summons, exclusive of the day of service. In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated October 17, 1922.

Zabriskie, Sage, Gray & Todd, Attorneys for Plaintiff, No. 49 Wall Street, Borough of Manhattan, City of New York.

To the defendant:

Notice is hereby given to you that, upon your default to appear, or answer the within summons, judgment will be taken against you for the sum of $1,164,348.90, with interest from the — day of ——, 19—; and the costs of this action.

Zabriskie, Sage, Gray & Todd, Attorneys for Plaintiff, 49 Wall Street, Borough of Manhattan, City of New York.

[fol. 94] SUPREME COURT, ROCKLAND COUNTY

[Title omitted]

CERTIFICATE OF SERVICE OF SUMMONS

I certify that on the eighteenth day of October, 1922, at the City and County of New York, I served the annexed Summons with Notice on The Government of the United States of Mexico by leaving the same with Carlos Felix as the Managing Agent one of the Defendants in this cause, by delivering a copy of said Summons and Notice to, and leaving the same with Carlos Felix, Managing Agent of the said Defendant personally.

P. E. Nagle, Sheriff. Charles Kramer, Deputy.

[fol. 95] SUPREME COURT, ROCKLAND COUNTY

[Title omitted]

CERTIFICATE OF SERVICE OF SUMMONS

I certify that on the twenty third day of October, 1922, at the City and County of New York, I served the annexed Summons with Notice on National Railways of Mexico by leaving same with Francisco P. de Hpyos as the Managing Agent, one of the Defendants in this cause, by delivering a copy of said Summons and Notice to, and leaving the same with Francisco P. de Hoyos, Managing Agent of the said Defendant personally.

P. E. Nagle, Sheriff. Charles Kramer, Deputy.

[fol. 96] EXHIBIT IN EVIDENCE

Mexico City, June 30, 1921.

Hon. Albert B. Fall, Secretary of Interior, Washington, D. C.:

National Railways of Mexico have ordered seizure all cars of my company which are operated under three hundred thousand dollar surety bond in favor of connecting American Railways stop This order dated June twenty-fifth is direct appropriation of private American property for which I am held responsible to bonding company and American lines and which are insured by prominent American insurance companies on condition that such property remain under my operation and control stop Furthermore received yesterday from National Railways of Mexico notification cancellation my company's contracts for operation of private freight trains to take effect today stop This action taken without warning and in spite of definite understanding to the contrary with previous rail-

way director Francisco Perez which understanding is directly repudiated and causes serious loss because of contracts for railway equipment entered into in good faith and for benefit of National Railways stop My company is the only one yet known to have received notice of cancellation of its railway contract as a private operator and I therefore claim unfair discrimination against me without reason or cause or without offer of compensation for nearly one-half million dollars of equipment placed at service of public of Mexico I still hope to adjust entire matter personally and have received almost unanimous support from that portion of shipping public that is concerned with international trade via Laredo Texas Mexico City lines.

Howard T. Oliver.

[fol. 97] Washington, Jul. 1st, 1921.

Howard T. Oliver, Mexico:

Transmitted your telegram to Secretary who informs me American Embassy Mexico has been instructed to use its efforts in your behalf if you desire their assistance.

Albert B. Fall.

[fol. 98] EXHIBIT IN EVIDENCE

Embassy of the United States of America

Mexico, July 5, 1921.

Mr. Howard T. Oliver, President the Oliver American Trading Company, Apartado 8 Bis. Mexico, City.

SIR: I have to acknowledge the receipt of your letter dated July 2, 1921, with enclosures relative to the difficulties your Company is experiencing with Nat'l Railways of Mexico.

In reply I am pleased to confirm the message delivered to you by telephone on July second, that the Embassy is under instructions to use its unofficial efforts to secure justice and fair treatment for you if you so desire.

I am Sir,

Your obedient servant, George F. Summerlin, Charge d'Affaires.

[fol. 99] EXHIBIT IN EVIDENCE

July 24, 1922.

State Department, Washington, D. C.

Bureau of Mexican Affairs

GENTLEMEN: During the past six months I have exercised great pressure on the Mexican Government to attain a settlement from them for the loss of my business, and have used every means at my disposal to make it possible to take my case off your "slate." The progress made to date follows:

Have won every court decision in the case, and every appeal—only to have new appeals made by the Mexican Government as fast as points are won. The last decision was to the effect that the Mexican Government had no right in the case at all, and that my equipment should be released. However, the legal conflict continues.

President Obregon has stated that he wanted my case settled, and has stated that he has ordered it done.

Leon Salines, Pres. National Rys., has frequently stated in private, and at least once in a public interview, the intention of the Mexican Government and National Railways to make a settlement with me at once. He has repeatedly promised to make counter-proposals, or to make appointments at stated and fixed hours only to completely ignore his promise and appointments.

I am reliably informed that Lic. Gil Robles, an attorney for the National Railways and the Mexican Government, has submitted his report, approving within twelve thousand dollars the claim I have submitted.

Alessio Robles, Secretary of Industry, has personally urged the Mexican cabinet to make immediate settlement with me.

Adolfo de la Huerta, Secretary of Finance, originally disapproved settlement with me and made some effort to block it but has been led to change his attitude, and in fact called the writer by telephone for an appointment to arrange the matter. (Unfortunately, I was not in my office the Saturday when he called.)

I am reliably informed that the official minutes of the "directiva consultativa" contain a formal resolution by the "operating board" ordering an immediate settlement of my case; I have been unable as yet to procure a copy of this resolution but am continuing efforts to obtain it.

Briefly summarized, the Mexican Government unofficially recognizes the justness of my claim, both as regards the amount and the intention to settle it, but on some pretence or other they avoid actual settlement.

[fol. 100] My experience as outlined above seems to parallel the history of other cases and negotiations. I am continuing my efforts to arrive at a settlement, and am not without hope in the matter. In this connection I beg to express my appreciation of the support

of the State Department through the various officials who have from time to time rendered very opportune assistance in my behalf. It is my hope that the final results may be satisfactory.

Upon reading your public statement of July 21, I was induced to send you a wire as per confirmation enclosed, because it was my privilege to discuss the press reports with a large number of men who are interested in the Mexican developments, and everywhere there was unanimous approval among them.

It may be advisable for me to go to Washington this week to consult you, and I hope it will not be inconvenient for you to receive me.

Respectfully yours, Howard T. Oliver.

[fol. 101] New York Supreme Court, Rockland County

[Title omitted]

Affidavit of Carlos R. Felix

State of New York,
County of New York, ss:

I, Carlos R. Felix, as Financial Agent in New York of the Government of the United States of Mexico, hereby certify with reference to the levy made by the Sheriff of the County of New York on said Government of the United States of Mexico on the 18th day of October, 1922, that I have not any rights, shares, debts or other property of said defendants, or either of them, or each of them, incapable of manual delivery, or any personal or real property of said defendants, or either of them, except as follows:

Furniture & Fixtures at 120 Broadway, Borough of Manhattan, New York City

1 Desk Lamp.
1 Desk Lamp, (new).
4 Remington Typewriters #LE-21408, LE-21409, LE-21410, LE-21411.
4 Royal Typewriters #556358, 556678, 55887, 559126.
1 "Protectograph" Check Writer Machine.
1 "Hedman" Check Writer Machine.
1 Electric Adding Machine, "Burroughs," estile 656 No. 334424.
1 "Burroughs" Hand Driven Adding Machine, #9-17319.
4 Electric Fans.
2 Electric Fans, (new).
1 "L. C. Smith Bros." Typewriter Machine No. 8-395859.
2 Revolving Typewriter Tables attached to desks.
[fol. 102] 1 Mahogany Parlor Set; Arm Chair, Rocking Chair & Sofa; leather cush.
1 Mahogany Receiving Set: Sofa and two Arm Chairs; leather cush.

1 Library Set; Sofa, Arm & Rocking Chairs; Mahogany & leather cush.
1 Rug, (new).
4 Steel Filing Cabinets—four drawers each.
1 Steel Safe Box, for books.
1 Steel Safe.
1 Mahogany Roll Top Desk.
1 Mahogany Flat Desk, 60 x 48.
1 Mahogany Flat Desk, 60 x 48.
1 Mahogany Flat Desk, 50 x 31.
2 Mahogany Flat Desks 31½ x 54½.
1 Mahogany Revolving Chair.
2 Mahogany Flat Desks, 50 x 31.
1 Mahogany Flat Desk, 60 x 35.
1 Mahogany Bookkeeper Desk.
1 Mahogany Roll Top Desk.
1 Glass Protector, 60 x 31.
1 Oak Book-shelf.
1 Mahogany book-shelf.
1 Steel Filing Cabinet, Mahogany finish.
7 Brass Cuspidors.
1 Mirror and Hangers.
3 Mahogany Book-shelf.
1 Mahogany Book-shelf.
5 Typewriter Desks (Mahogany).
2 Small Typewriter Mahogany Tables.
1 Small Telephone Mahogany Table.
1 Library Table (Mahogany).
1 Mahogany Table.
1 Imitation Mahogany Table.
2 Imitation Mahogany Tables (No price).
2 Carpets.
2 Tree Coat Hangers.
2 Tree Coat Hangers.
1 Tree Coat Hanger.
2 Leather Arm Chairs.
1 Mahogany & Leather Revolving Chair.
1 Mahogany Typewriter Chair.
3 Mahogany Arm Chairs }
3 Mahogany Arm Chairs } Revolving.
1 Mahogany Arm Chair }
3 Mahogany Typewriter Revolving Chairs.
1 Mahogany & Leather Arm Chair.
6 Mahogany Arm Chairs.
2 Mahogany Bookkeeper's Chairs.
6 Glass Desk Protectors
1 Glass Desk Protector (broken).
1 Polyprint Stencil Duplicator.
1 Wall Clock.
2 Rugs.

1 Automobile "Packard Limousine".
1 66" Walnut Roll Top Desk.
1 66" Walnut Table with glass top.
1 Walnut Revolving Chair.
6 Walnut Arm Chairs.
1 Walnut Coat Tree.
1 Walnut Basket.
1 96" Mahogany Table.
8 Arm Chairs.
2 60" Mahogany Double Flat Top Desks with glass tops.
[fol. 103] 4 Mahogany Revolving Chairs.
2 54" Mahogany Typewriter Desks.
2 Mahogany Typewriter Chairs.
2 Mahogany Coat Trees.
4 Mahogany Baskets.
4 Mahogany Trays.
15 Cuspidors and mats.
1 Davenport and two chairs.
Mexican Gold Coin, at one for two, $360.00.
Cash U. S. Currency, 51.29.
Check No. 9,498,766 American Railway Express Co., 1.48.
Accounts payable for advances to employees out of petty cash, 173.66.

In witness whereof, I have hereunto set my hand this 25th day of October, 1922.

Carlos R. Felix.

Sworn to before me this 25th day of October, 1922. Louis Russell, Notary Public, Kings County, No. 338. Certificate filed in New York County No. 527. Commission expires March 30th, 1923.

[fol. 104] [File endorsement omitted.]

[fol. 105] New York Supreme Court, Rockland County

[Title omitted]

Affidavit of Francisco P. de Hoyos

I, Francisco P. de Hoyos, as General Agent of National Railways of Mexico, and Operated Lines (Mexican Government Administration) hereby certify with reference to the levy made by the Sheriff of the County of New York on said National Railways of Mexico, and Operated Lines (Mexican Government Administration) on the 23rd day of October, 1922, that I have not any rights, shares, debts or other property of said defendants, or either of them, or each of

them, incapable of manual delivery, or any personal or real property of said defendants, or either of them except as follows:

2 Roll top Desks Imitation mahogany.
1 Flat top desk Imitation mahogany, Glass cover.
3 Stenographers' desks.
1 Table, imitation mahogany, glass cover.
1 Table, imitation mahogany.
1 Small table imitation mahogany, for typewriter.
3 Revolving chairs, imitation mahogany, leather seats.
2 Revolving chairs, imitation mahogany, for stenographers.
4 Chairs, imitation mahogany, leather seats.
7 Chairs, imitation mahogany.
1 Revolving Book stand imitation mahogany.
3 Standing hat and coat racks, imitation mahogany.
1 Book stand 4 sections imitation mahogany.
[fol. 106] 4 Filing cabinets, imitation mahogany, 4 sections.
2 Remington typewriters, Nos. LL 25177 & LE 83930. (No. 10 Model.)
1 Monarch typewriter, model No. 2 No. 45970.
6 Brass cuspidors.
1 inkstand lamp, Brass, for desk.
1 Blue Carpet.
2 Shelves, imitation mahogany, for stationery.
1 Small shelf, imitation mahogany, for stationery.
1 Check writing machine.
2 Metal baskets for papers (Mahogany).
2 Wire waste baskets.
1 Mimeograph.
1 Thermos bottle.
$49.82.

In witness whereof, I have hereunto set my hand this 24th day of October, 1922.

F. P. de Hoyos.

Sworn to before me this 24th day of October, 1922. Harriette O. Peloubet, Notary Public, New York County. (Seal.) County Clerk's No. 232. Register's No. 4223. Commission Expires March 30, 1924.

[fol. 107] [File endorsement omitted.]

[fol. 108] EXHIBIT IN EVIDENCE

National City Bank

Nov. 28, 1922.

Hon. Percival E. Nagle, Sheriff of the County of New York, 31 Chambers Street, New York City.

Attention Deputy Sheriff Charles Kramer in re The Oliver American Trading Company, Inc., v. The Government of the United States of Mexico and National Railways of Mexico

DEAR SIR: Amending the return heretofore filed with you in the above entitled action under date of October 21, 1922, pursuant to the terms of the warrant of attachment served upon this bank under date of Oct. 18, 1922, we hereby certify that there was in our possession when the said warrant was served the sum of $39,723.53 in an account entitled "National Railways of Mexico, Ferrocarriles Nacionales de Mexico."

The said sum above mentioned is the property of Ferrocarriles Nacionales de Mexico, a Mexican corporation.

Yours very truly, W. L. Sharing, Assistant Vice President.

[fol. 109] EXHIBIT IN EVIDENCE

State of New York, Secretary of State's Office

1126-K-MM. Albany, October 23, 1922.

Messrs. Zabriskie, Sage, Gray & Todd, 49 Wall Street, New York City.

GENTLEMEN: We are in receipt of your letter of the 20th inst., requesting a certificate that the "Government of the United States of Mexico" has not filed a statement and designation in this office. We have examined the indices to foreign corporations and no statement and designation of a corporation of that name can be found.

Kindly advise if the above name is the correct corporate name.

We have also made a search for the National Railways of Mexico and we do not find any record of said corporation.

We retain your money order for $2.00.

Yours respectfully, (Sgd.) John J. Lyons, Secretary of State, by P. S. S.

[fol. 110] [File endorsement omitted.]

[fol. 111] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT of New York

[Title omitted]

AFFIDAVIT OF GUNTHER R. LESSING—Filed October 11, 1923

Gunther R. Lessing, being duly sworn, deposes and says: That he is an attorney of the Government Administration, National Railways of Mexico, and is the same person who made the affidavit verified the 12th day of January, 1923, upon which the order to show cause herein was granted. That he was present and advised with Mr. F. P. De Hoyos at the time the affidavit of said Mr. De Hoyos, verified on the 6th day of February, 1923, was drafted. That the statement in said affidavit of Mr. De Hoyos "That from the time that said Railways were taken over by the Carranza Government in 1914, all of the property, funds and assets of the Railways became the property of the Government of Mexico and so continued," was not intended to convey the impression that the capital assets of the company, National Railways of Mexico, were taken over in 1914 and that title to the same was acquired by the Government. That the plaintiff has sought to construe the foregoing language more broadly than was intended, and inasmuch as the taking over of the Railways in 1914 was entirely in accordance with certain laws of Mexico and certain decrees promulgated in accordance therewith, [fol. 112] and in order that the Court may be informed of the character of said taking over and of the force and effect thereof, I herewith refer to said laws and decrees. That I am familiar with said decree and said law and know that the English translation of the said laws is correct. That the translation of said decree reads as follows:

"Venustiano Carranza, First Chief of the Constitutionalist Army, Entrusted with the Executive Power of the Union, in view of the extraordinary powers which have been conferred upon me in accordance with the Guadalupe Plan, and in keeping with the provisions of Article 145, Fraction X, of the Railroad Law, dated April 29th 1899,

Whereas, the requirements of the present campaign and of the public services exact that this First Chieftaincy assume the direction, management and administration of all the railway lines, way stations, terminal stations and their dependencies, and of the telegraph and telephone lines, situated in the region controlled by the Constitutionalist Government, I have deemed proper to issue the following:

Decree

Sole Article.—The Constitutionalist Government assumes from this date the direction, management and administration of all the railway lines, their way stations, terminal stations and other dependencies, whether they belong to them or to any companies or

concerns connected with the same, as well as all the telegraph, telephone or other lines of communication, whatsoever their nature, situated in territory controlled by this Government.

Therefore, I order it to be printed, published circulated and duly complied with.

Constitution and Reforms.

Given at Vera Cruz this 4th day of December, 1914.

The First Chief of the Constitutionalist Army, Entrusted with the Executive Power of the Union.

V. Carranza."

That the Federal Railway Law referred to in said decree, when translated into English, reads as follows:

"Art. 145. The Nation shall have the following rights:

[fol. 113] X. The Federal authorities have the right to requisition in case the public interest of the nation so demands, all the railroads, its personnel and all its utilities, and to use same as they may deem convenient.

In such event the Nation shall indemnify the railway companies. If there is no agreement regarding the amount of the indemnity there shall be taken as a base the average gross receipts during the past five years, increasing same by ten per cent., the Company defraying all expenses.

If only a part of the material is required, the provisions of paragraph IV of this article shall apply."

That the above translations correctly describe the action of the Carranza Government in taking possession of the railways of the National Railways of Mexico, and other railway properties of other private companies hereinafter referred to. That railway properties whose possession was taken over by the Carranza Government, as aforesaid, and which have since been administered by the Government of the United States of Mexico, were the physical properties, the personnel and utilities, connected with the operation and administration of the Railways and that the capital assets of the National Railways of Mexico were not taken over, nor was its franchise to exist as a corporation for the purpose of operating a railway seized, taken over or used by the Government of the United States of Mexico, or attempted to be so taken over. That the only power which the Government possesses in respect to the taking over of said Railways, or their properties, is contained in said Railway Law in the clause hereinabove quoted.

That I am regularly employed as attorney for the Government Administration of the National Railways of Mexico and receive a monthly retainer therefor. That during the entire period covered [fol. 114] by my connection with the Railways, in which I have been actively handling various matters in connection therewith, I have been obliged to understand the character of the operation of the Railways and its management. That there is no corporation operating the Mexican National Railways. That on page 14 of

plaintiff's reply brief a statement is made in regard to this, which is completely and entirely incorrect and at variance with the true facts. While plaintiff states that it is only a theory, it is founded on the following statement of alleged facts, which does not exist: "The National Railways of Mexico is a corporate entity, the officers of which are employed and appointed by the United States Government of Mexico." That certainly as attorney for said Railway Administration it would be essential for me to understand the personality of my client, and if such client were an artificial entity, to understand and know its legal constitution.

That the real name under which the Government of Mexico operates the Railways is Ferrocarriles Nacionales de Mexico y Anexos (Administracion Del Gobierno). That the translation of said words is as follows: National Railways of Mexico and Annexes, Administration of the Government. This title is merely a matter of convenience and apt expression to represent the Government operation not only of the lines which belong to the private corporation, National Railways of Mexico, but it also includes the following: Interoceanic Railway Company, which is property privately owned by British owners and taken over by the Government of Mexico and administered by it under the same title since the Carranza period, and also the Tehuantepec National Railway Company.

Furthermore, the title Ferrocarriles Nacionales de Mexico, y [fol. 115] Anexos is a designation which was adopted by the Carranza Government in its Constitutional period, after the success of the revolution and whose original form in the pre-constitutional period of Carranza was Ferrocarriles Constitucionalistas de Mexico, and that it then operated all of the lines which it is now operating under the name Constitutionalist Railways of Mexico.

Gunther R. Lessing.

Sworn to before me this 15th day of February, 1923. Louis Russell, Notary Public, Kings County, No. 338. [Seal.] Certificate filed in New York County, No. 527. Commission expires March 30th, 1923.

[fol. 116] [File endorsement omitted.]

[fol. 117] EXHIBIT IN EVIDENCE

L-30-278

The Government of the United States has at present no official relations with the administration now functioning in Mexico. This fact however does not affect the recognition of the Mexican state itself which for years has been recognized by the United States as an "international person" as that term is understood. In international practice the existing situation simply is that there is no official intercourse between the two states end quote.

Daugherty.

[File endorsement omitted.]

[fol. 118] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF ALFRED HAYES—Filed October 11, 1923

Alfred Hayes being duly sworn, deposes and says, that he is the attorney for the plaintiff herein. That annexed hereto, marked Exhibit A, is a true and correct copy of a letter from deponent to The Honorable, The Secretary of State, Washington, D. C., dated February 17, 1923, which letter was delivered at the offices of the Secretary of State, Washington, D. C., on said date, and annexed hereto is the original letter to the deponent signed, For the Secretary of State: William Phillips, Under Secretary, dated February 24, 1923, marked Exhibit B, which letter was received by deponent February 26, 1923.

Deponent begs leave to submit this affidavit for the reason that the said annexed letter of the Department of State, in connection with its prior official statement, clearly shows the distinction between the Mexican State and the Government of Mexico, which is one of the defendants herein, and that while the Department of State recognizes the Mexican State as an international person, it does not recognize the Mexican Government, and for the further reason that any declaration by the Department of State as to the status of a for-
[fol. 119] eign government is the best evidence of such status and is conclusive on this court whenever made.

Alfred Hayes.

Sworn to before me this 26th day of February, 1923. Samuel C. Whitman, Notary Public, Kings County. (Seal.) Kings County No. 172. Kings County Register's No. 4178. Certificate filed New York County No. 502. New York County Register's No. 4365. Commission expires March 30, 1924.

[fol. 120] EXHIBIT A TO HAYES' AFFIDAVIT

February 17, 1923.

The Honorable the Secretary of State, Washington, D. C.

SIR:

In re The Oliver American Trading Company, Inc., Plaintiff, vs. the Government of the United States of Mexico, Defendants

I beg to refer to a conversation this day had with the Solicitor's Office of the Department of State in regard to the above entitled matter, and to put in written form the request which I made in the course of that conversation.

I am the attorney for the Plaintiff in the above entitled action. On January 23rd a motion to dismiss the above entitled action was made by the Defendant, the Government of the United States of Mexico upon "the ground that said Defendant is a de facto government of an independent foreign sovereign nation, and therefore, is immune from the process of the courts, except upon its consent", and for the vacation of the attachment therein. (Order to show cause, dated January 12, 1923, made by Judge John C. Knox.)

Upon the argument of said motion the Assistant District Attorney of the United States for the Southern District of New York made the following statement upon the authority of the Department of State:

"The Government of the United States has at present no official relations with the administration now functioning in Mexico. This fact, however, does not affect the recognition of the Mexican state itself, which for years has been recognized by the United States as an 'international person,' as that term is understood in international practice. The existing situation simply is that there is no official intercourse between the two states."

Briefs have been presented by Hardin & Hess, attorneys for the said Defendant, and by the Honorable Frank L. Polk, permitted to file a brief as amicus curiæ, which seek to interpret such statement as according to the Government of the United States of Mexico such recognition as to entitle it to the immunities of a sovereign.

[fol. 121] In Mr. Polk's brief, received by me on February 15th, he says, referring to the above quoted statement made by the Department of State:

"The communication is brief and to the point. The United States recognizes the Mexican state, acknowledges its international character and makes no reservations, saying it shall have that status reenforced by all that international law accords it. Our State Department could not express it more generously."

A complete copy of the said memorandum of Mr. Polk is attached hereto.

I understand that in the action of the United States of Mexico vs. Lebertan Corporation, Supreme Court of the State of New York, New York County, a letter from the Department of State dated October 14, 1921, to the effect that the administration functioning in Mexico has not been recognized either as a de jure or a de facto government by the Government of the United States was presented to the court. I assume that there has been no change in the position of the Department of State since October 14, 1921, as regards the recognition of the Government of Mexico. In view of the fact that the briefs above mentioned have sought to throw doubt upon the meaning of the statement presented to the court by the Department of State in this case, and in view of the fact that such letter in the Lebertan case is not in the record in this case, I respectfully request

that the Department address a statement to me which I am at liberty to present to the court to the effect that the administration functioning in Mexico has not been recognized either as a de jure or a de facto Government by the Government of the United States.

This above motion is now pending before Judge Knox and a decision may be handed down at any time. I should therefore greatly appreciate it if the Department could give consideration to this request at its earliest convenience so that if the Department feels at liberty to make the statement requested it may be received in time to be laid before the court before any decision is rendered.

I am

Very respectfully, Alfred Hayes, Attorney for the Oliver American Trading Company, Inc.

[fol. 122] EXHIBIT B TO HAYES' AFFIDAVIT

Address official communications to the Secretary of State, Washington, D. C.

In reply refer to So 702.1211/1173.

Department of State,
Washington, February 24, 1923.

Mr. Alfred Hayes, care of Mr. William C. Dennis, Mills Building, Washington, D. C.

SIR: The Department has received your letter of February 17, 1923, in which as attorney for the plaintiff in the suit of the Oliver American Trading Company, Incorporated, against the Government of the United States of Mexico, you refer to a recent statement made to the court by the Assistant District Attorney of the United States for the Southern District of New York upon the authority of this Department, and to briefs presented to the court by the attorneys for the defendant in the case and by the Honorable Frank L. Polk as amicus curiæ. You state that these briefs seek to interpret that statement as according to the Government of the United States of Mexico such recognition as to entitle it to the immunities of a sovereign.

[fol 123] You, therefore, request to be furnished with a statement on the question of recognition of the Obregon administration in Mexico.

In reply you are advised that the Government of the United States has not accorded recognition to the administration now functioning in Mexico.

I am, Sir,

Your obedient servant, for the Secretary of State, William Phillips, Under Secretary.

[fol. 124] [File endorsement omitted.]

[fol. 125] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF JEROME S. HESS—Filed October 11, 1923

Jerome S. Hess, being duly sworn, deposes and says:

That he is a member of the firm of Hardin & Hess, which has appeared specially in these proceedings for the purpose of this application;

That on the 26th day of February, 1923, our firm was served with a copy of an affidavit of Alfred Hayes, verified the 26th day of February, 1923; that no leave had been obtained by the Plaintiff to serve said affidavit, nor was any reason assigned for serving the same at that time in the affidavit of Mr. Hayes or otherwise; that the affidavit of Mr. Hayes, taken together with the letter of Mr. Hayes to the Secretary of State dated February 17, 1923, tended to give the impression that the briefs of Mr. Frank L. Polk as amicus curiæ and of Hardin & Hess, the attorneys appearing specially in the proceedings, were construing the statement made on the authority of the Department of State by the United States Attorney in a way [fol. 126] which the Department of State did not intend.

That Mr. Frank L. Polk wrote to the Department of State requesting that it clarify the situation by stating that its communication of February 24, 1923, addressed to Mr. Alfred Hayes, was not in any sense a modification or alteration of the statement and position of the State Department as expressed through the United States Attorney on the hearing of this motion. Annexed hereto and made a part hereof is a copy of a letter dated March 2, 1923, from the Department of State addressed to the Hon. Frank L. Polk, 15 Broad Street, New York City, which letter, among other things, states that:

"Nothing contained in the Department's letter of February 24 is intended to modify the statement made to the court upon the authority of the Department, as above indicated."

Jerome S. Hess.

Sworn to before me this 5th day of March, 1923. Harriette O. Peloubet, Notary Public, New York County. County Clerk's No. 232. Register's No. 4223. Commission expires March 30, 1924.

[fol. 127] EXHIBIT IN EVIDENCE

Address Official Communications to the Secretary of State, Washington, D. C.

In reply refer to So 702.1211/1175.

(Seal.)

Department of State,
Washington, March 2, 1923.

The Honorable Frank L. Polk, 15 Broad Street, New York City.

SIR: The Department has received your letter of February 27, 1923, in which, referring to previous correspondence concerning the litigation being conducted by the Oliver American Trading Company against the Mexican authorities, you refer to an affidavit made by Mr. Alfred Hayes, attorney for the plaintiff, in which he sets forth a letter received by him from the Department under date of February 24, 1923, in response to his letter of February 17. You take exception to statements made in Mr. Hayes's letter to the Department concerning the interpretation placed, in briefs filed by yourself as amicus curiae, and by Messrs. Hardin and Hess, attorneys for the defendant in the litigation mentioned, upon a statement which was made to the court January 23, 1923, by the Assistant District Attorney of the United States for the Southern District of New York, upon the authority of the Department of State, and you say that the Department's answer to Mr. Hayes's letter might lead to the conclusion that it agreed with him as to the statements he [fol.128] made in the letter to which the Department replied. You therefore suggest that the Department send you a letter in clarification of the matter.

The only purpose of the Department's letter of February 24, to Mr. Hayes, was to furnish the statement requested by him on the question of the recognition by the United States of the Obregon Administration in Mexico. That statement is contained in the last paragraph of the letter and the preceding paragraphs merely contain the substance of Mr. Hayes's letter requesting such statement, and are not intended to set forth any conclusion of the Department as to the correctness of his interpretation of statements contained in the briefs filed by you and by Messrs. Hardin and Hess. Nothing contained in the Department's letter of February 24 is intended to modify the statement made to the court upon the authority of the Department, as above indicated.

I am, Sir,

Your obedient servant, for the Secretary of State, (S.) William Phillips, Under Secretary.

[fol. 129] [File endorsement omitted.]

[fol. 130] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF HOWARD T. OLIVER—Filed October 11, 1923

Howard T. Oliver, being duly sworn, deposes and says, that he is and at all times herein mentioned was the President of The Oliver American Trading Company, plaintiff herein and has been personally in charge of and familiar with all the proceedings in this action. That annexed hereto is a true and correct copy of an order made herein while this action was pending in the Supreme Court, Rockland County, by Robert F. Wagner, Justice of the Supreme Court of the State of New York, dated October 28, 1922, vacating the order herein made by Mr. Justice Wagner, dated October 27, 1922, requiring Carlos R. Felix to appear for examination concerning the property of the defendants herein in his hands and a copy of the affidavit of Jerome S. Hess, verified October 28, 1922, annexed thereto, which order and affidavit are marked Exhibit A.

That a copy of said order and said affidavit were served by Hardin & Hess, Esqs., on Zabriskie, Sage, Gray & Todd, who were formerly, and at that time, the attorneys of record for the plaintiff herein.

[fol. 131] That a true and correct copy of an order to show cause herein, made by Hon. A. S. Tompkins, Justice of the Supreme Court of the State of New York, dated November 2, 1922, and a true and correct copy of the affidavit of Jerome S. Hess, annexed to said order, verified the 1st day of November, 1922, are hereto attached and marked, Exhibit B. That copies of said order and affidavit were served herein on or about November 2, 1922, upon Zabriskie, Sage, Gray & Todd, Esqs., who were at that time the attorneys of record for the plaintiff herein.

That said order to show cause came on to be heard before Mr. Justice Tompkins, in the Court House in the City of Nyack, New York, but that the argument thereon was adjourned and before argument thereof this action was removed to the District Court of the United States for the Southern District of New York, and no decision upon the said order to show cause was ever made.

That a true and correct copy of a stipulation made by Zabriskie, Sage, Gray & Todd, dated January 4, 1923, at which time Zabriskie, Sage, Gray & Todd were the attorneys of record for the plaintiff herein extending the time of the defendants to appear specially from January 6, 1923, to January 13, 1923, is annexed hereto and marked, Exhibit C. That the time of the defendants to appear herein expired on January 6, 1923, and that no order or stipulation extending the time of the defendants to appear was made or entered herein subsequent to the 6th day of January, 1923, except by said stipulation, marked Exhibit C, and by the order to show cause made herein by Justice John C. Knox, dated January 12, 1923, returnable January 19, 1923, for the dismissal of this action and the vacating of

the attachment herein. That said stipulation marked Exhibit C, was prepared by Hardin & Hess, Esqs., and was given to them at their [fol. 132] urgent request on the ground that time was necessary to enable Jerome S. Hess to return to New York from the City of Mexico, and to effect a settlement of this case upon terms which they claimed were acceptable.

Howard T. Oliver.

Sworn to before me this 11th day of June, 1923. Samuel C. Whitman, Notary Public, Kings County. (Seal.) Kings County No. 172. Kings County Register's No. 4178. Certificate filed New York County No. 502. New York County Register's No. 4365. Commission expires March 20, 1924.

[fol. 133] EXHIBIT A TO OLIVER'S AFFIDAVIT

SUPREME COURT, ROCKLAND COUNTY

[Title omitted]

The plaintiff herein having obtained an order from Mr. Justice Wagner, one of the judges of the Supreme Court of the State of New York, dated the 27th day of October, 1922, requiring Carlos R. Felix to appear before one of the Justices of this Court at Special Terms, Part I, thereof, held in and for the County of New York, on the 30th day of October, 1922, at eleven o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, and be examined concerning any of the property of the defendants which said Carlos R. Felix had in his possession at the time of the levy by the Sheriff of the County of New York, pursuant to a writ of attachment issued herein by Hon. Arthur S. Tompkins, one of the Justices of this Court.

And said Carlos R. Felix having appeared specially before me for the purpose of making the application to vacate said order and without appearing generally herein; and contesting the jurisdiction of this Court over the defendants herein and the subject matter of the action, and said matter having been considered by me, and on motion of Hardin & Hess appearing specially for the purpose of this applica-[fol. 134] tion and not appearing generally, and contesting the validity of the jurisdiction of this Court over the defendants and their property and the subject matter of this action, it is

Ordered that the said order heretofore made by Mr. Justice Wagner, dated the 27th day of October, 1922, requiring said Carlos R. Felix to appear before one of the Justices of this Court for examination concerning the property of the defendants in his hands at the time of said levy, as aforesaid, be and the same hereby is in all respects vacated and set aside.

Dated, New York, October 28th, 1922.

Robert F. Wagner, Justice of the Supreme Court of the State of New York.

[fol. 135] SUPREME COURT, ROCKLAND COUNTY

[Title omitted]

AFFIDAVIT OF JEROME S. HESS

Jerome S. Hess, being duly sworn, deposes and says:

That he is a member of the firm of Hardin & Hess, attorneys for the Defendants herein; that he makes this affidavit specially for the purposes of this application only and not appearing generally on behalf of Defendants, but denying specifically the jurisdiction of the Courts of New York State of the persons of Defendants and of the subject matter of the action; that he has had personal charge of the matters in relation to the attachment and the proceedings in relation thereto on behalf of such Defendants. That the said Carlos Felix is the Financial Agent of the United States of Mexico in New York, and that your Deponent is the consulting attorney of said Financial Agency and has been acting as such for many years last past. That the Financial Agent was served with a copy of the writ of attachment granted by the Hon. Arthur S. Tompkins on October 13, 1922. [fol. 136] That the said writ was not served until about 3:00 p. m. of that day. That it was necessary for the said Felix to communicate with his Government in Mexico City concerning the levying of said attachment and to await instructions in regard thereto. That the said Felix did not possess any discretionary authority as to the action to be taken by him in representation of his Government, relative to said attachment proceedings, and that while the said Felix proceeded to immediately prepare his return to said writ, he nevertheless possessed no instructions for directions from his Government in relation to how he should proceed in relation thereto. But the said Felix prepared his return and the same was completed and signed by him on the 25th of October. That on the 26th of October the Defendant received instructions from his Government to protest the jurisdiction of the Courts to entertain a suit against his Government's property therein. That a protest was accordingly prepared and signed by the said Felix and the same was annexed to his return, to be delivered to the Sheriff of New York County. That said return and protest were left with your Deponent's firm to be filed with the Sheriff of New York County in due course. That while in your Deponent's possession and on the 27th day of October, the said Carlos Felix received a notice from the Sheriff by mail on the morning of said 27th day of October advising him that unless a return were filed forthwith, the Sheriff was directed to bring him to Court and examine him concerning the property of the Defendants before a Justice of the Supreme Court. That before your Deponent [fol. 137] could comply with said request and within three hours after the receipt of the same, the said Felix was served with an order for his examination before a Justice of the Court at Special Term, Part II, on October 30th. That your Deponent did on the 29th day of October file with the Sheriff of the County of New York his return pursuant to law. That between the receipt of said notice from

the Sheriff directing the said Carlos Felix as Financial Agent to make said return and the service upon him of the order for his examination herein there elapsed only 3 hours. That it was impossible for the said Felix to have complied with the said notice within the time elapsing between the said receipt of said notice and the service of the order herein. That said return has now been properly filed with the Sheriff of New York County.

Wherefore, Deponent respectfully prays, on behalf of said Defendants, but appearing only specially for the purpose of this application and not otherwise as hereinbefore stated, that the order heretofore granted for the examination of said Carlos Felix be vacated and set aside and that such other relief in the premises be granted as may be proper. No previous application for this or any similar relief has been made.

Jerome S. Hess.

Sworn to before me this 28th day of October, 1922. Walter B. Nadolny, Notary Public, N. Y. Co., #19. Reg. #3069.

[fol. 138] EXHIBIT B TO OLIVER'S AFFIDAVIT

SUPREME COURT, ROCKLAND COUNTY

[Title omitted]

Upon the summons, the writ of attachment herein granted the 18th day of October, 1922, and the affidavit of Howard T. Oliver, verified the 17th day of October, 1922, upon which the same was granted, and upon motion of Hardin & Hess, appearing herein specially solely for the purpose of making this application and not appearing generally herein, it is

Ordered that Plaintiff above-named appear before me, or one of the Justices of this Court, at the Court House in the City of Nyack, in the County of Rockland, on the 4th day of November, 1922, at ten o'clock in the forenoon of said day or as soon thereafter as counsel can be heard, and show cause why an order should not be made and entered herein dismissing the above entitled action and vacating the service of the summons herein and vacating said writ of attachment and setting aside any levy or levies made or attempted to be made thereunder.

Due cause therefore appearing let service of this order upon the [fol. 139] attorneys for Plaintiff on or before 5 o'clock on the 2nd day of November, 1922, be deemed sufficient.

Dated November 2, 1922.

(Sgd.) A. S. Tompkins, Justice of the Supreme Court of the State of New York.

[fol. 140] SUPREME COURT, ROCKLAND COUNTY

[Title omitted]

AFFIDAVIT OF JEROME S. HESS

Jerome S. Hess, being duly sworn, deposes and says:

He is a member of the firm of Hardin & Hess, of No. 50 Pine Street, New York City. Deponent is the consulting attorney for the United States of Mexico in New York. Deponent represents the United States of Mexico herein solely for the purpose of this application and without appearing generally herein or submitting said Defendant to the jurisdiction of this Court for the reason that said Defendant is a friendly foreign sovereign nation, which respectfully requests the Court to grant it that immunity from process which international usage accords under such circumstances.

On the 18th day of October, 1922, upon the application of Plaintiff, a writ of attachment was granted herein directed to the Sheriff of the County of New York and thereafter, as Deponent is informed and believes, various levies were attempted to be made under said writ of attachment.

[fol. 141] Thereafter the summons herein was attempted to be served by delivering copies thereof to and serving the same upon Carlos R. Felix, the Financial Agent of the United States of Mexico and upon Francisco P. de Hoyos, the General Agent of the National Railways of Mexico (Government Administration).

Deponent respectfully petitions this Court to decline to entertain jurisdiction of this action and to vacate the alleged service of the summons herein upon the said Carlos R. Felix and the said Francisco P. de Hoyos; to vacate the writ of attachment granted herein and to set aside any levy or levies made or attempted to be made thereunder.

No other or further application has been made for the relief herein asked.

Deponent asks that an order to show cause be made herein rather than to give the ordinary notice of motion because the character of the questions involved upon this application require a speedy determination.

(Signed) Jerome S. Hess.

Sworn to before me this 1st day of November, 1922. Harriette O. Peloubet, Notary Public, New York County. County Clerk's No. 232. Register's No. 4223. Commission expires March 30, 1924.

[fol. 142] EXHIBIT C TO OLIVER'S AFFIDAVIT

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

It is hereby stipulated and agreed by the undersigned, attorneys for the plaintiff above named, that the time of the defendants above named to appear specially herein for the purpose of raising any objection which the defendants or either of them may desire to raise to the jurisdiction of the Court, either as to the cause of action or as to the person of the defendants, or either of them, and to make any other motion with respect to the above entitled action, be and the same hereby is extended from the 6th day of January, 1923, to the 13th day of January, 1923.

Dated, New York, January 4, 1923.

Zabriskie, Sage, Gray & Todd, Attorneys for Plaintiff.

[fol. 143] [File endorsement omitted.]

[fol. 144] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

STIPULATION AND ORDER EXTENDING TIME

It is hereby stipulated and agreed by the undersigned, attorneys for the plaintiff above named, that the time of the defendants above named to appear specially herein for the purpose of raising any objection which the defendants or either of them may desire to raise to the jurisdiction of the Court, either as to the cause of action or as to the person of the defendants, or either of them, and to make any other motion with respect to the above entitled action, be and the same hereby is extended from the 6th day of January, 1923, to 13th day of January, 1923.

Dated New York, January 4, 1923.

Zabriskie, Sage, Gray & Todd, Attorneys for Plaintiff.

"So ordered." 1/5/23. Jno. C. Knox, D. J.

[fol. 145] EXHIBIT IN EVIDENCE—Filed October 11, 1923

SUPREME COURT, ROCKLAND COUNTY

[Title omitted]

Upon reading the affidavit of Jerome S. Hess, verified the 4th day of November, 1922, hereto annexed, and on motion of Hardin &

Hess, appearing specially for the purpose of obtaining this order, it is

Ordered that the time of the Defendants to appear herein or to make any motion with respect to the jurisdiction of this Court or the service of the Summons herein be and the same hereby is extended to the 28th day of November, 1922.

(Signed) A. S. Tompkins, Justice Supreme Court, State of New York.

[fol. 146] Exhibit in Evidence—Filed October 11, 1923

Supreme Court, Rockland County

[Title omitted]

Jerome S. Hess, being duly sworn, desposes and says:

That he is an attorney and a member of the firm of Hardin & Hess, and appears herein specially on behalf of the Defendants for the purpose of procuring the annexed order, and does not appear generally herein.

This action was attempted to be commenced by the service of a Summons and a Writ of Attachment upon one Carlos R. Felix, Financial Agent of the United States of Mexico in New York, on the 18th day of October, 1922, and the service of a Summons and a Writ of Attachment on Francisco P. de Hoyes, General Agent of the Government Operation of the National Railways of Mexico, on the 23rd day of October, 1922; that the time of the Defendants to appear herein will expire on the 8th day of November, 1922.

A motion has been made herein by the Defendants, appearing specially for that purpose, to vacate the service and to dismiss the action and vacate the Writ of Attachment and any levy that may have been made thereunder, which motion is still pending and undetermined. The Deponent, as attorney for the Defendants, may desire in case the aforesaid motion is denied to make various motions in [fol. 147] respect to the jurisdiction of the Court over the Defendants, and the subject matter of the action, and also with respect to the regularity of the service of the Summons herein:

Wherefore Deponent appearing specially for that purpose, requests that an order be made extending the time of the Defendants to appear or to move in respect to the jurisdiction or to the alleged service of the Summons herein to the 28th day of November, 1922.

(Signed) Jerome S. Hess.

Sworn to before me this 4th day of November, 1922. Sallie N. Merritt, Notary Public, Rock. Co.

[fol. 148] [File endorsement omitted.]

[fol. 149] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF ALFRED HAYES—Filed October 11, 1923

Alfred Hayes, being duly sworn, deposes and says, that he is of counsel for the plaintiff herein. That on June 11, 1923, the pending order to show cause herein, made by Hon. John C. Knox, Judge of the United States District Court for the Southern District of New York, which was argued before said Judge on January 23, 1923, came on for further proceedings, the plaintiff appearing by its attorney of record, Robert F. Greacen, and James A. Reed and Alfred Hayes, of counsel, and the defendant, The Government of the United States of Mexico, by Hardin & Hess, its attorneys in said order to show cause, by Jerome S. Hess and Harold B. Elgar, members of said firm.

The said attorneys for the plaintiff presented to the court, arguments for speedy decision of the question of jurisdiction heretofore argued and submitted, said attorneys for the defendant, The Government of the United States of Mexico, appearing and arguing in opposition to said request.

That upon said proceedings the attorneys for the plaintiff presented to the court a certain affidavit of Howard T. Oliver, verified June 11, 1923, to which was annexed a stipulation marked, Exhibit [fol. 150] C, the same being a copy of the original stipulation as made. During the course of said proceedings, James A. Reed stated that the original of the said stipulation, Exhibit C, had been prepared by Hardin & Hess, Esqs., and presented by Hardin & Hess, Esqs., to Zabriskie, Sage, Gray & Todd, Esqs., the then attorneys for the plaintiff, with the request for their signature, which was signed by the said Zabriskie, Sage, Gray & Todd, Esqs., in the form in which submitted by said Hardin & Hess, Esqs., except that the date was changed from January 3, 1923, to January 4, 1923, and the limit of the extension from January 26, 1923, to January 13, 1923. That thereupon said original stipulation was produced by deponent and admitted by the said Harold B. Elgar on said hearing to be the original stipulation and that it had been prepared by the office of Hardin & Hess for signature by Zabriskie, Sage, Gray & Todd, and had been signed and given to said Hardin & Hess with no changes except that the date was changed from January 3, 1923, to January 4, 1923, and the period of the extension was shortened from January 26, 1923, to January 13, 1923.

Deponent prays that this affidavit may be considered upon this application and filed as a part of the proceedings in this court herein.

Alfred Hayes.

Sworn to before me this 12th day of June, 1923. Samuel C. Whitman, Notary Public, Kings County. (Seal of Samuel C. Whitman, Notary Public, Kings County.) Kings County No. 172. Kings County Register's No. 4178. Certificate filed New York County No. 502. New York County Register's No. 4365. Commission expires March, 30, 1924.

[fol. 151] [File endorsement omitted.]

[fol. 152] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF HOWARD T. OLIVER—Filed October 11, 1923

Howard T. Oliver, being duly sworn, deposes and says: that he is the President of the plaintiff corporation herein.

That on January 23, 1923 a motion, made herein by Hardin & Hess, Esquires as Attorneys for the defendant the Government of the United States of Mexico, was argued before Honorable John C. Knox asking for the dismissal of this action on the ground that said defendant was immune from suit; that said motion remains undecided. That on the 17th day of September, 1923 the Attorney for the plaintiff was requested by Judge Knox's Secretary to appear at his Chambers at 2:30 P. M. to discuss this matter generally, and that at such time deponent, the plaintiff's Attorney Robert F. Greacen and Messrs. Harold B. Elgar and Ernest Angell of counsel for said defendant appeared before Judge Knox who then stated that he had received from the Secretary of State a letter dated September 8th, 1923 from which it appeared that recognition had been accorded to the Government of the United States of Mexico by the United States [fol. 153] of America, but that said letter did not indicate whether such recognition was de facto or de jure, nor whether such condition was conditional, nor the nature and extent thereof, nor whether immunity from suit resulted therefrom, nor whether in such case such immunity was retroactive in effect.

That prior to deponent's learning of the existence of such letter on September 17th, 1923 as aforesaid, he had been in doubt as to the nature, extent and effect of the recognition accorded to the Government of the United States of Mexico from the reports thereof appearing in the public press. That the source of his doubt was the reports of such recognition as they appeared in the public newspapers, conversations had with newspaper correspondents regularly assigned to Washington, D. C. who are frequently in personal conversations with Honorable Charles E. Hughes, Secretary of State in connection with relations with foreign countries and particularly with the United States of Mexico; and also a conversation had on September 8th, 1923 between one and two o'clock in the afternoon

at the Biltmore Hotel, New York City by deponent and plaintiff's attorney Robert F. Greacen, with Honorable Charles B. Warren, one of the Commissioners and plenipotentiaries, representing the United States of America in the conferences with the representatives of the Government of Mexico, at which conferences the agreements leading to the recognition accorded were arrived at. That all of said conferences clearly indicated that the recognition granted was conditional and was dependent upon compliance with certain stipulations by the Government of the United States of Mexico, which stipulations have not yet been made public. Newspaper accounts and correspondents in private conversation have all indicated the [fol. 154] extreme secretiveness surrounding the granting of the aforesaid recognition. Our doubt is also based on the fact that the State Department formerly stated, on or about the 10th of September that it saw no occasion to name an Ambassador to Mexico for some time to come and in this connection the newspaper correspondents have stated that the State Department does not consider this a full and complete recognition until an Ambassador shall have been appointed. That by reason of the indefiniteness and secrecy attendant upon the according of said recognition, deponent requested the attorney for the plaintiff to ask for a formal statement from the Department of State as to the nature and extent of such recognition; whether the same was retroactive in character, whether it was conditional upon the making or performance of any stipulations by the Government of the United States of Mexico and whether in case of non-performance thereof such recognition could, and would or might be withdrawn. That such letter was sent to the Secretary of State on September 14, 1923 and a copy thereof marked Exhibit A is annexed hereto and made a part hereof. That no reply to said request has yet been received.

That deponent is advised by counsel that whether immunity results from such recognition and the extent of such immunity is dependent upon the precise terms of the agreements entered into between the United States of America and the United States of Mexico; and deponent therefore prays this Court that no decision be rendered upon the pending motion until a reply to said request has [fol. 155] been received from the Secretary of State and the nature and extent of such recognition has been fully ascertained and determined.

Howard T. Oliver.

Sworn to before me this 18th day of September, 1923. George A. Glandon, Jr., Notary Public, Kings Co. Certified N. Y. Co.

[fol. 156] EXHIBIT A TO OLIVER'S AFFIDAVIT

(Copy)

New York, September 14, 1923.

The Honorable the Secretary of State, Washington, D. C.

SIR:

In re. The Oliver American Trading Company, Inc., Plaintiff, vs. The Government of the United States of Mexico and National Railways of Mexico, Defendants

The above-entitled action is pending in the United States District Court for the Southern District of New York. On January 23rd, a motion to dismiss said action was made by the defendant, the Government of the United States of Mexico, before Judge John C. Knox, which motion remains undecided.

On June 11th, Judge Knox in his Chambers stated to the attorneys for both litigants, Mr. Oliver, Senator Jas. A. Reed, Alfred Hayes and myself being present, that he was prepared to write his opinion and would hand down his decision unless he received word from the State Department. On June 14th the Secretary of State, Hon. Charles E. Hughes, stated to Mr. Oliver, President of the plaintiff, that it would be prejudicial to the interests of the United States if Judge Knox were to render a decision in his case at that time.

From a conversation in the Biltmore, New York City, on September 8th between Hon. C. B. Warren and Mr. Oliver and myself, we are led to believe that the recognition accorded to the present Government of the United States of Mexico was conditioned upon the making of certain stipulations by the Government of Mexico and that in case such stipulations were not made and carried out, such recognition could and would or might be withdrawn.

It is important to the plaintiff in the above action to know the following facts:

First. Is the recognition given by the United States of America to the Government of the United States of Mexico de facto, or is it de jure?

Second. When did such recognition take effect and does it have a retroactive operation?

Third. Was such recognition wholly unconditional, or was it conditioned upon any stipulations or agreements, written or oral, made, or to be made by the Government of the United States of Mexico, President Alvaro Obregon, or any other officials of said Government, or upon the performance of any such stipulations or agreements?

[fol. 157] Fourth. In case of the failure of the Government of Mexico to make or to perform such stipulations or agreements, could,

would or might the Government of the United States withdraw the recognition thus granted?

Fifth. Have such stipulations and agreements been made and fully performed, and if not, and such recognition was conditional thereon, when will recognition become fully effective?

If your answer to this letter indicates that the recognition accorded Mexico is conditional, it is the intention of the attorneys for the plaintiff to ask the Court to withhold its decision until such time as the conditions are fulfilled. If the recognition accorded is de facto and not de jure, we shall ask the Court to consider such fact in making its decision.

The information requested will be considered confidential and for use before the Court only. May we request that the information given us be fuller than you might be willing to give out publicly at this time.

On behalf of the plaintiff we earnestly request that the Department of State give the utmost consideration to the rights of the American citizen who has asked redress from the Courts of his own country. We believe that you will appreciate that the conduct of this case has at all times been guided by a spirit of patriotism and helpfulness to our Government, and refer to the fact that the plaintiff released the levy of the attachment against the Mexican Consulate at the request of your Department, and that at all times its President has refrained from publicity or statements of any kind which might have embarrassed the negotiations recently conducted in Mexico City.

We respectfully request a prompt reply.

Yours very truly, Robert F. Greacen, Attorney for the Oliver American Trading Co., Inc.

[fol. 158] [File endorsement omitted.]

[fol. 159] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF HOWARD T. OLIVER—Filed October 11, 1923

Howard T. Oliver being duly sworn, deposes and says, that he is the President of The Oliver American Trading Company, Inc., the plaintiff herein. That pursuant to the statement made in a letter of September 27, 1923 to Judge John C. Knox that further efforts would be made to secure a reply from the Secretary of State which should be responsive to the inquiries made in the letter addressed to said Secretary by Robert F. Greacen, on October 1st deponent wrote to the Honorable Charles E. Hughes, Secretary of State, a

letter, copy of which is annexed hereto, marked Exhibit A, and that attached to said letter was a copy of letter dated September 27, 1923 from Robert F. Greacen to Honorable John C. Knox, copy of which is attached hereto marked Exhibit B, and a copy of letter from William Philips, Acting Secretary of State, to Robert F. Greacen dated September 25th, a copy of which is annexed hereto marked Exhibit C, and a copy of a letter of September 14th, 1923 from Robert F. Greacen to the Secretary of State, a copy of which, marked Ex-
[fol. 160] hibit A, was attached to an affidavit of Howard T. Oliver, verified September 18, 1923, heretofore filed herein.

That on October 9, 1923 deponent received a letter from Charles E. Hughes to deponent dated October 8th, which original letter is attached hereto marked Exhibit D.

That said letter of Secretary Hughes, dated October 8th in reply to Exhibit A herein, does not make response to the specific inquiries made, makes no denial of any of the statements of fact contained in said Exhibits A and B and does not deny that the recognition accorded to Mexico was part of a general agreement entered into between the Commissioners of the Governments of the United States of America and the United States of Mexico. The Secretary of State writes that his reply "may be a sufficient response to the inquiries made in behalf of" The Oliver American Trading Company, Inc., thereby indicating a doubt as to the sufficiency of his reply.

Deponent has attached hereto Exhibits E and F which are newspaper items from responsible public journals confirming the accuracy of the statements heretofore made by the plaintiff as to the relations between the two governments. Said exhibits are not attached for the purpose of controverting the statements of the Department of State but to present additional evidence bearing on immunity in order that the court, in making its determination of the pending motion, may have before it all the facts so far as these are obtainable at the present time.

That said Exhibit E is an article contained in the evening edition of The Wall Street Journal dated October 6th, setting forth "ratification of two claims conventions and the interchange of ambassadors between Washington and Mexico City are the steps yet to be taken to complete the latest attempt to restore to a normal basis [fol. 161] relations between the United States and Mexico", that "it is known that Mexico has made informal promises", that if she breaks her promises, this country can withdraw recognition and that in case of such breach "the definite form of Mexican promises probably would be published", thereby showing that the State Department anticipates possible failure of Mexican ratification and a breach which would lead to punitive measures.

Exhibit F is a news item from the New York American of October 6th, 1923 stating that it was announced at the White House on October 5th that President Coolidge would not appoint an ambassador to Mexico until the treaties of amity and commerce between the two governments have been ratified and that the treaties would be submitted to the Senate on the opening day of Congress in December. This formal statement of the President of the United States

clearly proves that our government itself is withholding the full benefits which would ordinarily accompany recognition by establishing ad interim relations only and refusing to restore complete diplomatic relations until the ratification of the entire agreement. Since the Executive Department deems this course wise, the Judiciary should be guided thereby and refuse to bestow immunity, the grant or refusal of which is its function and prerogative.

That further doubt as to the continuance of recognition of the Mexican Government for any length of time arises from the recent disintegration of the triumvirate consisting of Alvero Obregon, Adolfo de la Huerta and Flatarco Elias Calles, which, as a matter of public knowledge ,has controlle- the governmental organization of Mexico for the past two year-.

That further doubt as to the continuance of such recognition is created by the recent news items indicating the probable resignation or retirement of President Obregon whose place, in that event, would [fol. 162] be filled by action of the presen- Mexican Congress under the Constitution of 1917 which contains no provision for presidential succession except by such action. Such an event is likely to lead to serious disorders.

It is the opinion of a large number of persons, well informed as to the many political forces now opposing one another in Mexico, that the collapse of the existing government is imminent and that the scheduled elections cannot be held without bloodshed. Such a collapse would entirely abrogate the recognition recently accorded to the Mexican Government, thereby restoring the political conditions which existed at the time when this suit was commenced and the attachment herein granted and levied.

Howard T. Oliver.

Sworn to before me this 10 day of October, 1923. Wm. J. Brophy, Notary Public, Queens County, No. 1963. Cert. Filed in N. Y. County. N. Y. County Clerk's No. 851. N. Y. County Register's No. 3434.

[fol. 163] EXHIBIT A TO OLIVER'S AFFIDAVIT

October 1, 1923.

Honorable Charles E. Hughes, Secretary of State, Department of State, Washington, D. C.

DEAR MR. SECRETARY:

Re Oliver American Trading Company vs. The Government of the United States of Mexico and National Railways of Mexico

You have devoted considerable personal attention to the progress and delays in the above entitled action and consequently you undoubtedly will recognize the propriety of my reviewing certain

phases that may have escaped your notice. I desire to convince you of the earnestness with which we are defending our just legal rights before an American court of law, hoping that your further consideration may lead to a correction of certain steps in the past that have only succeeded in prolonging the embarrassment forced upon you by the defendants herein.

I realize very fully that the Department of State has been under severe pressure by the Mexican Government who, in their anxiety to avoid the consequences of their illegal and wrongful acts have considered that in some manner the Department of State could and should discourage this civil action. This is a plain civil suit brought against the defendants herein by virtue of the rights and privileges granted an American citizen in the Constitution of the United States, Article 3, Section 2, paragraph one, wherein the judiciary is given jurisdiction over controversies between foreign states and American citizens. Sharp lines of distinction separating the three branches of government are more keenly held by Americans than by Mexicans, who seem to cling to the undemocratic and worn out ideas of sovereignty and the power of the Executive Department over the others.

We believe that American principles clearly demand that the judiciary pass on questions of jurisdictions and law, but that the Executive Department should provide complete and accurate information for the court when requested. Many confusing and ambiguous statements have been made by the State Department in this case, and without enumerating them at this time, I would respectfully remind you of them and their futility in bringing about the relief from embarrassment which the Department of State desires. Heretofore when we have called them to your personal attention you have corrected confusions and ambiguities that had been injected into the case.

On May 28th and June 11th, Judge John C. Knox told the assembled attorneys of both litigants in this case, among other things, that he was prepared to hand down a decision, and would do so unless he received word from the State Department. You will recall that on June 14th the writer asked you, in person, to refrain from any interference with the rendition of the decision, to which you replied, that in view of the conferences which began May 14th in Mexico City, you believed it would be unwise to have a decision handed down at that time, and furthermore, that you felt free to use all your power as Secretary of State, and as representative of the President of these United States, to see that no decision was handed [fol. 164] down. You did however, state that of course, if the conferences should fail, then you might look upon this suit in a different light. The conferences did not fail according to your public statements, but there appears to be a reasonable doubt as to the extent of the immunity from suit, which may be enjoyed by the Mexican Government under the circumstances surrounding the recent recognition.

The interests of the State Department and ourselves can best be served at this time by the maintenance of the attachment in this suit until such time as Mexico shall have complied with agreements

entered into during the recent conferences. In order to properly request a delay in the handing down of the decision of jurisdiction still pending herein we need certain accurate official information from the State Department to lay before the court. As quoted above you were most emphatic in expressing your desire for a delay in this case so I therefore urgently ask your assistance as Secretary of State and as representative of the President of the United States to obtain an amplification of the letter of Mr. Phillips to Mr. Robert F. Greacen dated September 26th, so as to include definite answers to Mr. Greacen's questions in his letter to you of September 14th.

I am advised by counsel that the information contained in Mr. Phillips' answer of September 25th is insufficient to enable the court properly to pass on the question of jurisdiction. We have learned from Mr. Charles B. Warren, and other sources of information, that there are conditions attached to the recent recognition accorded Mexico, and it is vital to the interests of the plaintiff to produce the verification of this fact to the court. We therefore ask you to authorize a complete answer to our letter of September 14th, copy of which is enclosed, and to advise us whether the recognition is sub modo, and if Mexico should fail to perform the agreements made by her diplomatic relations would be suspended. If, in the public interest you do not feel at liberty to answer our precise inquiries or to disclose, at this time, the terms of the agreements entered into with Mexico, will you not at least inform us when such agreements will be made public or available for the court?

We have asked the court that no decision be handed down until the full terms of the recent agreement between the United States and Mexico are made public, or complied with. If an unfavorable decision is handed down against us, it is our intention, already stated to the court, to ask the Supreme Court of the United States of America to review the questions involved.

In view of your personal knowledge of the circumstances and actions of the State Department in this case, we believe that you will recognize the propriety of our request for information, and the practical value that such information will have in the interests of the plaintiff as well as the Department of State.

Respectfully yours, Howard T. Oliver.

[fol. 165] EXHIBIT B TO OLIVER'S AFFIDAVIT

New York, September 27, 1923.

Honorable John C. Knox, United States District Judge, 233 Broadway, New York City.

MY DEAR JUDGE KNOX: Enclosed herewith I hand you copy of letter dated September 25, 1923, received by me from William Phillips, Acting Secretary of State. You will observe that this letter is in identical terms with the letter sent to you by the Department dated September 8th, and does not reply to the inquiries con-

tained in my letter to the Secretary of State dated September 14, 1923, a copy of which is attached to the affidavit of H. T. Oliver filed with you on September 18th last.

The recognition accorded to Mexico by the exchange of Charge d'Affaires ad interim merely is obviously only one of the steps necessary to put into full operation the entire understanding entered into by the Commissioners of the two countries. Wherever recognition is conditional or sub modo it may be withdrawn, or diplomatic relations may be suspended, where the conditions imposed are not complied with. This rule is stated in

1 Moore International Law Digest, 73:

"Recognition is, as a general rule, absolute and irrevocable. Nevertheless, it may happen, by way of exception, that the recognition is conditional or is given sub modo. Such is the case when certain charges or restrictions are imposed on a new state at the time when its independent existence is recognized, such as an obligatory neutrality, commercial liberty, or religious liberty. If the restriction constitutes a condition, the powers which have subjected their recognition to it have the right to insist upon the new state's conforming itself to the condition imposed, and if it fails, to consider their recognition as not given. If the recognition was sub modo, it will not be withdrawn, but other measures may be taken, such as the suspension or rupture of diplomatic relations or reprisals."

Whatever position the Court may take as to the general effect of recognition on immunity, several important points will remain in this matter for decision.

First. Whether there is immunity where a government operates, through an administrative body, a railway system, maintaining an office within the jurisdiction, particularly as regards a contract entered into within the United States.

We are informed that the decision of your Honor in the Gul Djemel case holding that there is no immunity in the case of the vessel belonging to the Turkish Government engaged in commerce will probably be argued before the Supreme Court of the United States, in October.

Second. That jurisdiction fully attached before there was any form of recognition of the Mexican Government and that no sub- [fol. 166] sequent facts can divest such jurisdiction. No complaint has been served or filed herein. The pending motion deals solely with the question of jurisdiction. That the jurisdiction of the Court depends upon the state of things at the time of action brought, and that after vesting, it cannot be ousted by subsequent events, has been uniformly held by the United States Supreme Court in a long line of decisions, one of the earliest being that of Chief Justice Marshall in Mollan v. Torrance, 9 Wheat 537 (1824) and ending in the very recent decision of Chief Justice Taft to the same effect

in Whichita Railroad v. Pub. Util. Com. now in the Advance Sheets of Vol. 260 U. S. Page 48.

A closely analogous decision in New York is that of Koppel v. Heinrichs, 1 Barb. 449 (S. C. 1847) holding that where, after action brought, the defendant was appointed counsel of a foreign government, the jurisdiction of the State Court was not divested.

In Ex parte Kyle, 67 Fed. 306, it was held that a Cherokee court, having jurisdiction of an Indian charged with larceny, continued to have jurisdiction even though while the matter was pending, he had become a citizen of the United States.

You will note that the letter to me is signed by the Acting Secretary of State in the absence from Washington of Secretary Hughes who, heretofore, has dealt personally with this case. Upon the Secretary's return, we shall make further efforts to secure a reply to our letter from the Secretary, which will be responsive to the inquiries made.

The agreements with Mexico must necessarily become public in the near future. Until the publication thereof, or our securing adequate information directly from the Department of State as to the terms of the same, we submit that no decision should be made herein. We also think it desirable that the decision awaits the determination by the United States Supreme Court of Gul Djemal case.

We are sending a copy of this letter to Hardin & Hess Esqs.

Very truly yours, Robert F. Greacen.

[fol. 167] EXHIBIT C TO OLIVER'S AFFIDAVIT

(Copy)

Address Official Communications to the Secretary of State, Washington, D. C.

In reply refer to Me 702.1211/1235.

Department of State,
Washington, September 25, 1923.

Mr. Robert F. Greacen, Counselor at Law, 60 Wall Street, New York City.

SIR: The Department acknowledges the receipt of your letter of September 14, 1923, in which, as attorney for the Oliver American Trading Company, Incorporated, in its action against the Government of the United States of Mexico and the National Railways of Mexico, now pending in the United States District Court for the Southern District of New York, you request information with respect to the recognition by the Government of the United States of the Government of Mexico.

Without making categorical response to your several inquiries, the Department would inform you that the negotiations between the American and Mexican Commissioners reached a happy termination

and resulted in the recognition by this Government of the existing Government of Mexico. On Friday, August 31, 1923, it was formally announced by the Department of State that the two Governments "have resolved to renew diplomatic relations between them, and therefore, pending the appointment of ambassadors, they are taking the necessary steps to accredit, formally, their respective Charges d'Affaires," and on September 3, Mr. George T. Summerlin was formally accredited Charge d'Affaires ad interim at Mexico City, and Mr. Manuel C. Tellez, the Mexican representative in Washington, presented his letter of credence as Charge d'Affaires ad interim on the same date.

I am, Sir,

Your Obedient servant, William Phillips, Acting Secretary of State.

[fol. 168] EXHIBIT D TO OLIVER'S AFFIDAVIT

Address official communications to the Secretary of State, Washington, D. C.

In reply refer to So.

Department of State,
Washington, October 8, 1923.

Mr. Howard T. Oliver, the Oliver American Trading Company, Inc., 61 Broadway, New York City, N. Y.

SIR: I have your letter of October 1, 1923, in relation to the case of Oliver American Trading Company vs. the Government of the United States of Mexico and National Railways of Mexico, and in which you seek further information in relation to the recent recognition by this Government of the existing Government in Mexico and request definite answers to the questions set forth in the letter of Mr. Robert F. Greacen, addressed to the Department under date of September 14, last.

It may be a sufficient response to the inquiries made in behalf of your Company to say that the recognition recently accorded the Government of Mexico by the Government of the United States was complete and unconditional.

I am, sir,

Your obedient servant, Charles E. Hughes.

[fol. 169] EXHIBIT E TO OLIVER'S AFFIDAVIT

The Wall Street Journal, Saturday Evening, October 6, 1923

Mexican Links Tightening

Promise Rather Than Treaty Justified, for the Latter Might Cause Obregon's Overthrow

Washington.—Ratification of two claims conventions and the interchange of ambassadors between Washington and Mexico City are the steps yet to be taken to complete the latest attempt to restore to a normal basis relations between the United States and Mexico.

However, recognition of Mexico by this government is not contingent on either of these two steps. Recognition has been formally granted without strings. It can be withdrawn but not held up in any way for it is now a fact, and George T. Summerlin is the formally credited Charge to Mexico City.

The claims conventions which were agreed upon by United States and Mexican commissioners in their recent conferences at Mexico City must be ratified by both the Mexican and American congresses. The Mexican congress has not yet taken that action, but advices here indicate there will be no hitch in that quarter.

The administration is hopeful of ratification by our own Congress soon after it meets in December. At present there are no signs of an organized fight to halt ratification, but the Senate Foreign Relations Committee, as well as individual Senators, are believed certain to make a searching inquiry as to what constituted the basis of recognition and why this government apparently has taken informal Mexican promises on matters vitally affecting American interests below the Rio Grande.

A Victory for Obregon

The impression is growing here that President Obregon won something of a diplomatic victory in securing recognition as he did. The delay of the State Department in making public full details incident to recognition supports this impression.

Without giving a formal written promise in the shape of a treaty relative to such questions as Article 27 and the agrarian laws under which property of foreigners was subject to confiscation, President Obregon brings his country into the circle of civilized nations since other governments followed the action of this country in extending recognition.

Without in any way modifying the provisions of the constitution of 1917, which has been described as fully as Bolshevik as the Russian regime, President Obregon secured a prize which the cleverest of Russians have been denied.

Meanwhile the American government gave up its demand for a treaty incorporating the guaranties which it demanded. So far as any public announcement goes it may not have secured those

guaranties in any form, although it is known that Mexico has made informal promises.

When the American and Mexican commissioners began their conference in Mexico City they took up the differences between the two governments point by point. Minutes of these meetings were kept.

Concessions are "Understood"

The Mexican commissioners gave for incorporation in the minutes their interpretation of Article 27. They are understood to have made plain that this article would not be given a retroactive effect, which is what this country has contended against.

In discussion of the agrarian laws, the Mexican commissioners were understood to have made clear that their government would give adequate compensation for lands of foreigners seized under provisions of those laws.

That is the form that Mexico's promises take. When the conferences were completed the minutes were signed by the secretaries of the two commissions. The promises would have been informal with the minutes signed by all the commissioners. They are more informal with the minutes signed only by secretaries.

Thus Mexico is morally but not legally bound. If she breaks her promises this country can withdraw recognition. Then the burden of proof for that act will be with this country. Under those circumstances the definite form of Mexican promises probably would be published. However, if there had been a treaty, as Secretary Hughes originally demanded, Mexico would at once be condemned, if she tried to break it.

Promises Informal

The justification set up for accepting informal promises is that a formal written promise by President Obregon would result in his overthrow by the Mexican people with the government taking his place at once rejecting the treaty he had made. With informal promises Obregon's face is saved with his own people and he continues in power with some chance that he and his successors will keep the promises made.

In other words officials of this government apparently reached the conclusion that unless they settled the Mexican situation as they did, there was little chance of settling it in the near future. That is the conclusion which those best informed draw from the events of the past three years.

The claims conventions set up machinery for adjustment of claims between citizens of the United States and Mexico. They were originally proposed in Mexico City but at that time were considered here as rather incidental to other features of the Mexican question. Since the settlement they have been the one feature commented upon by officials of the two governments.

Early Action Expected on Mexican Treaty

Washington.—It is understood that the President will send treaty with Mexico to Senate for its approval early in next session of Congress. It is unlikely that exchange of ambassadors will take place until treaties are ratified. President is said to have arrived at no specific conclusion on transportation problems of country, although he is said to have discussed these problems with several railway presidents who have called upon him. President is very much interested in efforts of certain organizations to prevent pol-ution of our coastal waters, and it is understood he will recommend cooperation on part of government in this connection.

[fol.170] EXHIBIT F TO OLIVER'S AFFIDAVIT

New York American, October 6, 1923

Coolidge Defers Naming Ambassador to Mexico

Washington, Oct. 5.—President Coolidge will not appoint an Ambassador to Mexico until the treaties of amity and commerce between the two governments have been ratified, it was announced at the White House to-day.

The treaties will be submitted to the Senate on the opening day of Congress in December.

[fol. 171] [File endorsement omitted.]

[fol. 172] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

[fol. 173] OPINION

KNOX, D. J.: This action was begun in the Supreme Court, Rockland County, by the service of a summons with notice, in New York County, upon Carlos R. Felix, who is alleged to be the Managing Agent of the Government of the United States of Mexico. Such summons, upon October 23, 1922, was also served upon Francisco P. de Hoyos, as the Managing Agent of the National Railways of Mexico, Government Administration.

On application of plaintiff, Mr. Justice Tompkins of the State Supreme Court, granted a warrant of attachment, and the Sheriff of New York County made service of the same upon Felix and de Hoyos. Each of them certified that he did not possess any property of the respective defendants, with the exception of certain furniture and fixtures, together with less than $1,000 in cash.

On November 11, 1922, the Mexican Government, acting through Felix, as its Financial Agent in New York, and the National Railways of Mexico (Government Administration), acting through de Hoyos, as its General Agent, removed the action to this court, it [fol. 174] being alleged that the suit was between plaintiff, a Delaware corporation, and aliens, to wit: The Government of the United States of Mexico, a sovereign State, and National Railways of Mexico, a corporation organized under the laws of that country.

It is conceded that defendant railway corporation, at the accrual of plaintiff's alleged cause of action, and at the time of the service of summons, was being operated and controlled by the Mexican Government.

The record upon removal came here upon December 7, 1922.

About two weeks thereafter, the attorneys for the Mexican Government, appearing specially, obtained an order requiring the plaintiff to show cause why the action should not be dismissed upon the ground that said defendant is the de facto government of an independent foreign sovereign nation, and therefore immune from the process of our courts, except upon its consent, and also to show cause [fol. 175] why the service of the summons and attachment should not be vacated and set aside in that the same were not properly served. The order provided that defendant's time to appear or make any motion with respect to the jurisdiction of the court, as to the cause of action, or to plead herein, be extended until five days after the entry of an order upon the motion.

When the order to show cause came on for argument, the Court had presented for consideration the interesting question as to whether an unrecognized de facto foreign government is subject to suit in the courts of this country. The point was argued extensively and subsequently, was elaborately briefed by both sides.

Due to circumstances over which I had no control, a ruling upon the motion was delayed for several weeks. In the meantime, certain negotiations and conferences began between Commissioners acting upon behalf of the United States and certain others representing the Mexican Government. Believing that there was some likelihood [fol. 176] that these conferences would be followed by the recognition of the Mexican State by our Government, it seemed not improper to delay a decision upon the motion for some reasonable time in order to learn whether the ultimate result of the negotiations would have any relevant bearing upon the motion. Counsel for the parties were advised of my contemplated purpose, whereupon I proceeded to await developments.

In response to an inquiry made of the Secretary of State, the following letter was received:

"Letter Head of Department of State

In reply refer to So 702.1211.

Washington, September 8, 1923.

Honorable John Clark Knox, United States District Judge, New York City.

My Dear Judge Knox: Referring to your letter of July 11th last, with respect to the suit of the Oliver American Trading Company, Inc., against the United States of Mexico, in which you requested me to advise you of developments with respect to negotiations between the American and Mexican Commissioners, I am glad to inform you that those negotiations have reached a happy termination and have resulted in the recognition by this Government of the existing Government of Mexico. On Friday, August 31, 1923, it was formally announced by the Department of State that the two Governments "have resolved to renew diplomatic relations between them, and therefore, pending the appointment of ambassadors, they are taking the necessary steps to accredit, formally, their respective Charges d'Affaires," and on September 3d, Mr. George T. Summerlin was formally accredited Charge d'Affaires ad interim at Mexico City, and Mr. Manuel C. Tellez, the Mexican representative in Washington, presented his letter of credence as Charge d'Affaires ad interim on the same date.

Faithfully yours, (Signed) Charles E. Hughes."

[fol. 177] I had supposed that this communication would for practical purposes be decisive of defendant's motion.

It is, however, suggested by counsel for plaintiff, that the recognition accorded the Mexican Government may be conditional or sub mode, and that for such reason final action upon the motion should not be taken until the purport and effect of any understanding or agreements between the representatives of the two governments and having to do with recognition, are publicly known.

The recognition of Mexico, as reported by the above quoted letter of the Secretary of State, is without condition, and I perceive no reason for imagining the possibility that one exists. On the contrary, I have no alternative than to regard the recognition as full and complete. As was argued by the plaintiff, when this case was first presented, the Courts have no power to make an independent determination of any political question over which the Executive or Legislative [fol. 178] Departments of the Government have jurisdiction. Jones v. United States, 137 U. S. 202; Agency of Canadian Car & Foundry Co. Ltd. v. American Car Co., 258 Fed. 363.

Plaintiff further says, even though the recognition of Mexico be regarded as complete, that the jurisdiction of this Court fully attached before the recognition of Mexico became a fact, and is not to be divested by the occurrence of that event. In support of this proposition, attention is called to the decision in Mollan v. Torrance, 9 Wheat, 537; Wichita R. R. Co. v. Public Utility Commission, 260

U. S. 48: Koppel v. Heinrichs, 1 Barb. 449 and ex parte Kyle 67 Fed 306.

None of these cases had to do with a recognized sovereign power, and for that reason may be said not to be in point. Furthermore, the Supreme Court in Oetjen v. Central Leather Co. 246 U. S. 302 expressly said:

"It is also the result of the interpretation by this Court of the principles of international law that when a government which originates in revolution or revolt is recognized by the political department of our government as the de jure government of the country in which it is established, such recognition is retroactive in effect and validates all the actions and conduct of the government so rec- [fol 179] ognized from the commencement of its existence. Williams v. Bruffy, 96 U. S. 176; Underhill v. Hernandez, 168 U. S. 250,253. See same case 65 Fed. Rep. 577."

To this, the Court added the following quotation from the Hernandez case:

"Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves."

The recognition that has been accorded the present government of Mexico is sufficiently broad to permit the application of the foregoing principles to the case at bar. Also they would seem to dispose of plaintiff's further contention that there is no immunity for a foreign sovereign state, with respect to a contract entered into within the United States, and having to do with a railway system operated by such government through the medium of an administrative body. [fol. 180] It is true that in some recent decisions of the Court there has been an intimation that when a foreign power engages in such enterprises, and in pursuance thereof sends its vessels into the ports of this country, such ships should be held to the same liabilities as attach to vessels privately owned. In these cases, however, the causes of action were maritime in nature and the ships themselves were within the jurisdiction where libels were filed against them. For this reason, the actions were sua generis. Here the alleged breaches of plaintiff's contracts occurred in Mexico and the cause of action falls within the prescription of the Supreme Court in the Hernandez case.

The only remaining obstacle to granting the relief asked by defendants, is the contention that jurisdiction has been acquired through a general appearance herein upon the part of their attorneys. [fol. 181] Without detailing the reservations made by such attorneys upon the occasions upon which they have come into court, their clear intendment, when fairly construed, is that the appearance was special and designed to raise the question of immunity presented by their motions.

Even upon the questions of appearance, the Court is more concerned with substance than with form.

Since the foregoing memorandum was written, I have received this further letter from the Secretary of State:

"Letter Head Department of State

Washington, October 8, 1923.

In reply refer to So.

Honorable John C. Knox, United States District Judge, 233 Broadway, New York City.

My Dear Judge Knox: Permit me to inform you that under date of October 1, 1923, Mr. Howard T. Oliver, of the Oliver American Trading Company, Inc., wrote me at length in regard to the case of his company against the Government of the United States of Mexico and National Railways of Mexico, and requested definite answers to certain specific questions put to me by counsel for the company in a [fol. 182] communication under date of September 14. These questions had reference to several aspects of the recognition by this Government of the Government of Mexico.

I feel it my duty to inform you that I am advising Mr. Oliver that it seemed to be a sufficient response to the inquiries made in behalf of his Company to say that the recognition recently accorded the Government of Mexico by the Government of the United States was complete and unconditional.

I am, my dear Judge Knox,

Very sincerely, (Signed) Charles E. Hughes.

The motions are granted. October 11, 1923. —— ——, U. S. D. J.

[fol. 183] United States District Court, Southern District of New York

[Title omitted]

Certificate of Question of Jurisdiction—Filed October 29, 1923

Be it remembered, that on the 23rd day of January, 1923, this cause came on to be heard upon the motion of the defendant, The Government of the United States of Mexico, to vacate the warrant of attachment herein and to dismiss the suit upon the ground that the Government of the United States of Mexico is an independent foreign sovereign nation and is, therefore, immune from process of the courts except upon its consent, and for the vacation and setting aside of the attachment herein, and the court, upon due consideration of said motion and after hearing arguments of counsel, and upon the concession that National Railways of Mexico are operated and con-

trolled by the Government of the United States of Mexico, sustained the same, on the sole ground that the defendant, The Government of the United States of Mexico, has been duly recognized by the United States of America, and diplomatic relations between the two governments have been resumed. The Government of the United States of Mexico is therefore under the law of nations and the prin-[fol. 184] ciples of comity, entitled to immunity from suit in the Courts of the United States of America, unless upon its own consent, which, in this instance, has not been given.

For such reason, it has been ordered that the Court will not further exercise jurisdiction herein, and that this action shall stand dismissed and that the attachment heretofore granted be vacated and any levy made thereunder be vacated and set aside.

This ruling of the Court is hereby certified to the Supreme Court of the United States.

I hereby certify that the matter in controversy herein, as shown by the record, exceeds in value three thousand dollars ($3,000) exclusive of interest and costs.

This certificate is made conformably to the Judicial Code, Section 238 and my opinion filed herein is made a part of the record and will be certified and sent up as part of the proceedings, together with this certificate.

Dated, this 29th day of October, 1923.

Jno. C. Knox, Judge of the United States District Court, Southern District of New York.

[fol. 185] [File endorsement omitted.]

[fol. 186] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ASSIGNMENT OF ERRORS—Filed October 29, 1923

Now comes the plaintiff, The Oliver American Trading Company, Inc., by Robert F. Greacen, its attorney, and in connection with its petition for a writ of error in this cause, assigns the following errors which plaintiff avers occurred upon the hearing and proceedings in this case, to wit:

First. The court erred in granting the motion of the defendants, The Government of the United States of Mexico and National Railways of Mexico, dismissing this action and vacating the warrant of attachment herein.

Second. The court erred in granting judgment in favor of the defendants, The Government of the United States of Mexico and National Railways of Mexico, and against the plaintiff.

Third. The court erred in holding that the defendants, The Government of the United States of Mexico and National Railways of Mexico are immune from the process of the courts except upon their consent for the reason that such Government had not, at the time of service of process herein or at the time when motion to dismiss was made, been recognized as a de jure or de facto government by the Government of the United States of America.

Fourth. The court erred in holding that the defendants, The Gov-[fol. 187] ernment of the United States of Mexico and National Railways of Mexico, are immune from the process of the courts for the reason that under the Constitution of the United States, the determination of the political status of a foreign government is to be made by the President of the United States or the Department of State of the United States and the Government of the United States of Mexico had not, at the time of service of process herein or at the time of the making of the motion to dismiss, received recognition from such executive officers of the United States.

Fifth. The court erred in failing to hold that jurisdiction of the court over the subject-matter of the action and the persons of the defendants had fully attached and could not be divested by any subsequent facts.

Sixth. The court erred in holding that the District Court of the United States has no jurisdiction over the defendants, The Government of the United States of Mexico and National Railways of Mexico, for the reason that such decision is in violation of Section 2 of Article 3 of the Constitution of the United States which expressly provides that the judicial power shall extend to all cases in law between the citizens of a state and foreign states, citizens or subjects, and is likewise in violation of the statutes conferring judicial powers upon the said District Court of the United States.

Seventh. The court erred in granting judgment for the reason that no complaint has been filed or served herein and the motion for dismissal was premature until the precise nature of the cause of action was set forth by complaint.

Eighth. The court erred in granting judgment in favor of the defendants for the reason that they failed to perfect the removal pro-[fol. 188] ceeding by pleading, answering or demurring within 30 days after removal as required by statute and the motion as made is not a pleading within the meaning of section 29 of the Judicial Code.

Ninth. The court erred in holding that the defendants, The Government of the United States of Mexico and National Railways of Mexico, are immune from the process of the courts for the reason that such decision is in violation of the fourteenth amendment of the Constitution of the United States in that the defendants are granted immunity from legal liability to the plaintiff and thereby the plaintiff is deprived of its property without due process of law.

Tenth. The court erred in holding that it had no jurisdiction over the defendants, The Government of the United States of Mexico and National Railways of Mexico, in this cause for the reason that said defendants were, at the time of the commencement of this action, doing business within the Southern District of New York.

Eleventh. The court erred in holding that the defendants, The Government of the United States of Mexico and National Railways of Mexico, are immune from the process of the courts for the reason that at the time of the commencement of this action the defendants, The Government of the United States of Mexico and National Railways of Mexico, were engaged in a commercial enterprise, to wit, the management and operation for profit of a railway system and in connection therewith were doing business within the Southern District of the State of New York and the contract sued upon was made within the United States.

Twelfth. The court erred in ordering that the attachment herein be vacated and judgment entered dismissing the action for the reason [fol. 189] that property of the defendants had been levied upon under said attachment situated within the Southern District of New York, which was being used in the carrying on of a commercial enterprise within said District.

Thirteenth. The court erred in holding that the defendants, The Government of the United States of Mexico and National Railways of Mexico, were immune from the process of the courts for the reason that the court delayed making a decision herein on the state of facts existing at the time of the commencement of this action and at the time of making of motion by the defendants for dismissal of this action at the urgency of said defendants and against the repeated and vigorous protests of the plaintiff to the court, said delay being secured for the purpose and with the result that said defendant, The Government of the United States of Mexico, should secure recognition as a sovereign from the United States of America and thereby the defendants, having no special privileges or immunities, were enabled to secure a change in political status for the purpose of defeating the just cause of action of the plaintiff herein.

Fourteenth. The court erred in holding that there was no jurisdictino over the defendants, The Government of the United States of Mexico and National Railways of Mexico, for the reason that said defendants, in and by the acts of their attorneys duly acting for them herein, waived immunity from suit, consented to the exercise of jurisdiction and appeared, generally, herein, particularly by making motions herein on grounds other than the absence of jurisdiction over the persons of the defendants by reason of immunity; and by making motions for purposes other than for dismissal because of such lack of jurisdiction; by seeking and acting upon orders and stipulation extending time to appear or make any motion with [fol. 190] respect to the jurisdiction of the court as to cause of action herein, or to plead herein; by vacating the order for examination

of Carlos R. Felix on grounds involving the existence and nature of the cause of action sued on; by removing this action from the Supreme Court of New York to the District Court of the United States; by appearing in court from time to time and delaying and hampering the plaintiff in the conduct of this action; by contesting the validity of the service of the summons herein and the jurisdiction over the subject-matter of this action; and by applying to the court for an order dismissing the action with taxable costs and disbursements.

Fifteenth. The court erred in dismissing the action as to the defendant, National Railways of Mexico, for the reason that the time of said defendant to appear or make any motion with respect to the jurisdiction was extended on motion of Hardin & Hess, Esquires, as its attorneys by order of Justice A. S. Tompkins prior to the removal of this action from the Supreme Court of the State of New York to November 28th, 1922 and thereafter and subsequent to the removal to the district Court of the United States by stipulation dated January 4th, 1922 and the order of Honorable John C. Knox, thereon, said time to make any motion in respect to said action was extended to January 13th, 1923 and that no further extension to appear, answer, demur, plead or make any motion herein has been secured by said defendant, National Railways of Mexico and that at all times since January 13th, 1923 said defendant has been in default herein and has not appeared or pleaded as required by Section 29 of the Federal Judicial Code.

Wherefore, The Oliver American Trading Company, plaintiff, prays that the judgment herein for the errors aforesaid and for the [fol. 191] other errors in the record and proceedings aforesaid may be reversed and that it may be restored to all things that it may have lost by reason of the said judgment.

Dated New York, October 29, 1923.

Robert F. Greacen, Attorney for Plaintiff. Office & P. O. Address, 60 Wall Street, Borough of Manhattan, City of New York.

[fol. 192] [File endorsement omitted.]

[fol. 193] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

PETITION FOR WRIT OF ERROR—Filed October 29, 1923

And now comes the Oliver American Trading Company, Inc., by Robert F. Greacen,, its attorney, and feeling itself aggrieved by the final judgment of this court entered against it and in favor of the

defendants on the 29 day of October, 1923, in which judgment certain errors were committed to the prejudice of petitioner, hereby prays that a writ of error may be allowed to it from the Supreme Court of the United States, to the District Court of the United States, for the Southern District of New York, and, in connection with this petition, petitioner herewith presents its assignment of errors.

The petitioner further says that upon giving such bond as may be required all further proceedings herein be suspended and the warrant of attachment and the levies thereunder heretofore issued upon behalf of the plaintiff upon property of the defendants herein be continued in full force and effect and said order vacating said attachment as to the defendants, the Government of the United States of Mexico and National Railways of Mexico be not enforced pending the hearing on the said writ of error and of the coming down to this [fol. 194] court of the mandate of the Supreme Court of the United States.

Dated, New York, October 29, 1923.

Robert F. Greacen, Attorney for Plaintiff. Office and Post Office Address, No. 60 Wall Street, Manhattan Borough, New York City.

[fol. 195] [File endorsement omitted.]

[fols. 196 & 197] Supersedeas and Costs Bond for $1,000—Filed and approved October 29, 1923; omitted in printing

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[fol. 198] United States District Court, Southern District of New York

[Title omitted]

Order Allowing Writ of Error and Stay—Filed October 29, 1923

On reading the petition of the plaintiff, the Oliver American Trading Company, Inc., for writ of error and the assignment of errors, and upon due consideration of the record of said cause, it is

Ordered, that a writ of error be allowed from the Supreme Court of the United States to the United States District Court for the Southern District of New York, as prayed for in said petition and that said writ of error and citation thereon be issued, served and returned to the Supreme Court of the United States in accordance with law upon condition that the said petitioner and plaintiff-in-error give security in the sum of One Thousand ($1,000) Dollars, that the said plaintiff-in-error shall prosecute said writ of error to effect, and if said plaintiff-in-error fail to make his plea good, shall

answer to the defendants-in-error for all costs and damages that may be adjudged or decreased on account of said writ of error, and it is further

Ordered, that upon the plaintiff giving security as above set forth, all proceedings on the part of the defendants and each of them and their attorneys to enforce said order or any of the provisions thereof be stayed, and the warrant of attachment and the levies thereunder [fol. 199] heretofore issued upon behalf of the plaintiff upon property of the defendants herein be continued in full force and effect and that the funds and property attached thereunder remain in the custody of the Sheriff of the County of New York, pending the hearing on the said writ of error and of the coming down to this court of the mandate of the Supreme Court of the United States.

And the said plaintiff in error now presenting a bond in the sum of One Thousand ($1,000) Dollars with the National Surety Company as surety, it is ordered that the same be and hereby is duly approved as a supersedeas bond.

In witness whereof, I have hereunto set my hand this 29th day of October, 1923.

Jno. C. Knox, J. U. S. D. C.

[fol. 200] [File endorsement omitted.]

[fol. 201] WRIT OF ERROR—Filed October 29, 1923

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable the Judges of the District Court of the United States for the Southern District of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, or some of you, between The Oliver American Trading Company, Inc., Plaintiff, and The Government of the United States of Mexico and National Railways of Mexico, defendants, a manifest error hath happened, to the great damage of the said The Oliver American Trading Company, Inc., as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the 29 day of October, in the year of our Lord one thousand nine hundred and twenty-three.

Alex. Gilchrist, Jr., Clerk of the District Court of the U. S. for the Southern Dist. of N. Y.

The foregoing writ is allowed. Dated Oct. 29, 1923.

Jno. C. Knox, U. S. District Judge.

[fol. 202] [File endorsement omitted.]

[fol. 203] CITATION—In usual form, showing service on Hardin & Hess; filed November 5, 1923, and omitted in printing

[fol. 204] [File endorsement omitted.]

[fol. 205] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF S. L. GREACEN

Samuel L. Greacen being duly sworn, deposes and says that he is over the age of twenty-one years.

That on the thirtieth day of October, 1923, at No. 120 Broadway, in the Borough of Manhattan, City, County and State of New York, he served the annexed Citation on The Government of the United States of Mexico, a foreign public corporation, one of the defendants herein, by delivering to and leaving with Carlos R. Felix, the managing agent of said The Government of the United States of Mexico within this jurisdiction, a true copy thereof, and at the same time showing the said Carlos R. Felix the signature of Judge Jno. C. Knox on the original Citation hereto annexed.

That said defendant is a foreign public corporation and that no person has been designated by it upon whom process may be served within the State of New York as provided by Section 111 of the Stock Corporation Law; that neither the President, Vice-President, Treasurer, Assistant Treasurer, Secretary and Assistant Secretary of The Government of the United States of Mexico, nor any officer performing corresponding functions under another name can be found with diligence within the State of New York.

[fol. 206] Deponent further says that he knew the said Carlos R. Felix to be the said managing agent of the said The Government of the United States of Mexico, one of the defendants in the above-entitled action.

Samuel L. Greacen.

Sworn to before me this 2nd day of November, 1923. Marion A. Raftery, Notary Public, Kings Co., #100. Reg. #4103. Certificate filed in New York Co., #352. Reg. #4280. (Seal.)

[fol. 207] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF S. L. GREACEN

Samuel L. Greacen, being duly sworn, deposes and says that he is over the age of twenty-one years.

That on the thirtieth day of October, 1923, at No. 233 Broadway, in the Borough of Manhattan, City, County and State of New York, he served the annexed Citation on the National Railways of Mexico (Government Administration) a foreign public corporation, one of the defendants herein, being the direct operation by the Government of the United States of Mexico of a system of railways and being part of the said Government, by delivering to and leaving with Francisco P. De Hoyos, the managing agent of said National Railways of Mexico (Government Administration) within this jurisdiction, a true copy thereof, and at the same time showing the said Francisco P. De Hoyos the signature of Judge Jno. C. Knox on the original Citation hereto annexed.

That said defendant is a foreign public corporation directly operated by the Government of the United States of Mexico and is part of the said Government, and that no person has been designated by it upon whom process may be served within the State of New York as provided by Section 111 of the Stock Corporation Law; that neither the President, Vice President, Treasurer, Assistant Treasurer, Secretary and Assistant Secretary of the said National Railways of Mexico (Government Administration) nor any officer performing corresponding functions under another name can be found with due diligence within the State of New York.

Deponent further says that he knew the said Francisco P. De Hoyos to be the said managing agent of the said National Railways of Mexico (Government Administration), one of the defendants in the above-entitled action.

Samuel L. Greacen.

Sworn to before me this 2nd day of November, 1923. Marion A. Raftery, Notary Public, Kings County, #100. (Seal.) Reg. #4103. Certificate filed in New York County #352. Reg. #4280.

[fol. 208] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

STIPULATION RE TRANSCRIPT OF RECORD

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated Nov. 20th, 1923.

Robert F. Greacen, Attorney for Plaintiff. Hardin & Hess, Attorneys, Appearing Specially for the Government of the United States of Mexico.

[fol. 209] UNITED STATES OF AMERICA,
Southern District of New York, ss:

[Title omitted]

CLERK'S CERTIFICATE

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 23rd day of November in the year of our Lord one thousand nine hundred and twenty-three and of the Independence of the said United States the one hundred and forty-eighth.

Alex. Gilchrist, Jr., Clerk. (Seal of the District Court of the United States, Southern District of N. Y.)

Endorsed on cover: File No. 29,972. S. New York D. C. U. S. Term No. 662. The Oliver American Trading Company, Inc., plaintiff in error, vs. The Government of the United States of Mexico and National Railways of Mexico. Filed November 24th, 1923. File No. 29,972.

Office Supreme Court, U. S.
FILED
DEC 8 1923
WM. R. STANSBURY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 662.

THE OLIVER AMERICAN TRADING COMPANY, INC.,
Plaintiff-in-Error,

AGAINST

THE GOVERNMENT OF THE UNITED STATES OF MEXICO AND NATIONAL RAILWAYS OF MEXICO,
Defendants-in-Error.

Statement on Behalf of Defendant-in-Error, The Government of the United States of Mexico.

HARDIN & HESS,
GEORGE F. SNYDER,
Attorneys for Defendant-in-Error, THE GOVERNMENT OF THE UNITED STATES OF MEXICO, appearing specially, etc.

CHARLES WATSON RUSSELL, Printer

Supreme Court of the United States

OCTOBER TERM 1923.

THE OLIVER AMERICAN TRADING COMPANY, INC.,
Plaintiff-in-Error,

AGAINST

THE GOVERNMENT OF THE UNITED STATES OF MEXICO AND NATIONAL RAILWAYS OF MEXICO,
Defendants-in-Error.

No. 662.

WRIT OF ERROR FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

Statement on behalf of defendant-in-error, The Government of the United States of Mexico.

Plaintiff-in-error, The Oliver American Trading Company, Inc., has made a motion in this Court for an order directing that the argument of this case be advanced and that the same be set down for hearing at an early date.

Defendant-in-error, The Government of the United States of Mexico, protesting to the juris-

diction of this Court and not hereby appearing generally nor waiving its claim to immunity from all suit and process, offers no objection to the granting of this motion.

This defendant-in-error, however, does not in any way accede to or accept the "Reasons for Advancing" set out on page 5 *et seq.* of plaintiff-in-error's printed Motion to Advance filed herein, but on the contrary challenges and denies the accuracy and materiality of the statements contained in the paragraphs numbered 1 to 5 inclusive under the caption "Reasons for Advancing" and 1 to 8 under the caption "Public Importance, Complexity and Novelty of Questions Involved."

Respectfully submitted,

HARDIN & HESS,
GEORGE F. SNYDER,
Attorneys for Defendant-in-Error, The Government of the United States of Mexico, appearing specially, etc.

FILED
FEB 16 1924
WM. R. STANSBU
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1923.

No. 662.

THE OLIVER AMERICAN TRADING COMPANY, INC.,

Plaintiff-in-Error,

against

THE GOVERNMENT OF THE UNITED STATES OF MEXICO AND NATIONAL RAILWAYS OF MEXICO,

Defendants-in-Error.

BRIEF OF THE PLAINTIFF-IN-ERROR.

ROBERT F. GREACEN,
ALFRED HAYES,
Counsel for Plaintiff-in-Error.

CHARLES WATSON RUSSELL, Printer.

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Supreme Court of the United States

OCTOBER TERM 1923

THE OLIVER AMERICAN TRADING COMPANY, INC., Plaintiff-in-Error, AGAINST THE GOVERNMENT OF THE UNITED STATES OF MEXICO AND NATIONAL RAILWAYS OF MEXICO, Defendants-in-Error.	No. 662.

BRIEF OF THE PLAINTIFF-IN-ERROR.

Statement.

This is error from the final order herein, dated October 29th, 1923, made by Hon. John C. Knox, District Judge, for the Southern District of New York, dismissing the action with $167.50 costs and disbursements, to be paid to the defendant, the Government of the United States of Mexico, by the plaintiff, and vacating a warrant of attachment granted therein while the action was pending in the Supreme Court of the State of New York, prior to removal thereof, and also vacating the levies thereunder and directing the

Sheriff of the County of New York to return the property attached to the Government of the United States of Mexico (fols. 3-4). The writ is taken under Section 238 of the Judicial Code, the only question in issue being as to the jurisdiction of the Court below. The essential portion of the certificate as to jurisdiction, made by Judge Knox, reciting that it is made upon the concession that National Railways of Mexico are operated and controlled by the United States of Mexico, is as follows (fols. 183-4). That the Court has sustained the motion,

> "* * * on the sole ground that the defendant, The Government of the United States of Mexico, has been duly recognized by the United States of America, and diplomatic relations between the two governments have been resumed. The Government of the United States of Mexico is therefore, under the law of nations and the principles of comity, entitled to immunity from suit in the Courts of the United States of America, unless upon its own consent, which, in this instance, has not been given.
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> "For such reason, it has been ordered that the Court will not further exercise jurisdiction herein, and that this action shall stand dismissed and that the attachment heretofore granted be vacated and any levy made thereunder be vacated and set aside."

Upon the approval of the supersedeas bond of plaintiff, Judge Knox ordered that all proceedings on the part of the defendants to enforce said order or any of the provisions thereof be stayed, and that the warrant of attachment and the levies thereunder be continued in full force and effect, and that the funds and property

attached remain in the custody of the sheriff, pending the hearing on this writ of error and the coming down of the mandate of the Supreme Court (fols. 198-9, 98-9).

No complaint has been filed or served. The order under review was made upon an order to show cause and the affidavits submitted by both parties thereon.

Facts.

This action was commenced October 18, 1922, in the Supreme Court of the State of New York, Rockland County, by the plaintiff, a Delaware corporation, all the stock of which is owned by H. T. Oliver, an American citizen (fol. 74), by the service by the sheriff of New York County of a summons, together with notice that judgment would be taken for $1,164,348.90, upon the defendant, the Government of the United States of Mexico, by leaving the same with Carlos R. Felix, as the Managing Agent of said defendant, regularly transacting business at the office of the Financial Agency of Mexico in the Equitable Building, 120 Broadway, New York City, and by like service, October 23, 1922, upon the defendant National Railways of Mexico, by leaving such summons and notice with Francisco P. DeHoyos as Managing Agent thereof, he regularly transacting business at the office of the National Railways of Mexico, as administered by the Government of Mexico, by officers and employes appointed by it, in the Woolworth Building, 233 Broadway, New York (fols. 94-5, 75-6, 83-4).

Said defendant National Railways of Mexico is claimed by the Mexican Government to be op-

erated directly by the said Government, and to be a part thereof and must not be confused with National Railways of Mexico, a Mexican corporation, incorporated March 28th, 1908, having an office at 25 Broad Street, New York, which owns the railways, but has not operated the same since the seizure by the Mexican Government in 1914 (fols. 58, 111-115).

In 1912 President Francisco Madero was assassinated. Thereafter the country fell into a condition of anarchy, various parts being under the control of military officers. One of these was General Carranza, who eventually obtained control of most of Mexico, and his government was recognized by the United States (fols. 31-32).

Prior to 1914 the National Railways of Mexico, a Mexican corporation, incorporated March 28, 1908, owned and operated various railway lines in Mexico. On December 4, 1914, Carranza, issued a decree, whereby on behalf of the government he seized and took over all the property of the National Railways of Mexico and the administration thereof.

In 1919 a military revolt was commenced against the Carranza Government by Alvaro Obregon, which was successful, and on May 21, 1919, Carranza was killed; thereafter Adolfo de la Huerta became Provisional President. On January 21, 1920, Obregon became and has since continued to be President.

The Obregon Government took possession of the said railways and has continued the possession and operation thereof to the present time. The name of the corporate entity "National Railways of Mexico," with the phrase "Government

Administration" attached was used in such operation (fol. 33).

Mr. Lessing swears that the full name employed is "Ferrocarriles Nacionales de Mexico y Anexos (Administracion Del Gobierno)," which translated is "National Railways of Mexico and Annexes, Administration of the Government" (fol. 114).

Howard T. Oliver, a citizen of the United States, has been engaged in business in Mexico for about fifteen years. In 1915 he became the head of the Oliver American Trading Company, which corporation has been widely known throughout Mexico, having represented such firms as Du Pont, International Harvester Company, Swift and others. This corporation was engaged in transporting freight partly for its own account and partly for others over the railway lines of the National Railways of Mexico (Government Administration). It owned and held under lease various locomotives and also used in Mexico large numbers of freight cars, owned by American Railroads, procured by filing bonds for their safe return. These bonds amounted to upwards of $300,000. During the period of revolutionary activities, the plaintiff corporation kept merchandise moving between the United States and Mexico, and provided more cars for use in Mexico than any other company. It operated up to as many as five freight trains a week with as many as fourteen locomotives and cars from Texas to Mexico City (fols. 33, 74-75).

On January 10, 1921, a written agreement was entered into, whereby it was agreed that the defendants should pay to the plaintiff $5 pesos

per day for each thousand pounds of tractive effort of each locomotive which the plaintiff should place in the service, upon said railways between February 1, 1921, and March 31, 1921; thereafter said contract was continued by mutual consent, and it was agreed that the plaintiff should collect all sums due defendants for freight, carried upon trains drawn by the plaintiff's locomotives.

On May 5, 1921, it was agreed between the plaintiff and Francisco Perez, as Director General of the National Railways of Mexico that defendants should continue the payment of rental for all of plaintiff's locomotives, then operating and for such additional locomotives up to eighty as the plaintiff should procure, and that the freight collected by plaintiff should be credited to the Railways' account, and that the excess of freight above rental of such locomotives should be applied to the purchase of said locomotives and that the said rental contracts should continue until all the locomotives operated or thereafter operated up to the number of eighty should have been purchased by defendants. Plaintiff purchased and caused to be shipped to Mexico ten additional locomotives and closed a contract with other parties for the purchase of seventy additional locomotives (fols. 36-37, 87).

In June, 1921, the defendants wrongfully refused to carry out the contract (fols. 37, 96), and on September 3, 1923, the Government of the United States of Mexico placed an embargo upon all of the plaintiff's locomotives which prevented their removal from Mexico, and in spite of a decision of the Mexican courts, affirmed upon

appeal, the Government of the United States of Mexico, refused to release said embargo or permit the removal of said locomotives. The plaintiff has elected to treat such refusal as a sale of the locomotives which were to be paid for by the freight collected under the agreement of May 5, 1921.

This action is brought for breach of said contracts to recover rental of locomotives and freight cars, for oil and supplies furnished, for the value of the locomotives furnished under the contract and retained by the government and for damages for the breach of contract as set forth in the attachment affidavit as follows:

Rental for locomotives, February 1 to July, 1921	$156,010.70	(Mexican money)
Oil, coal and repairs	15,889.28	
Freight over payment	1,715.88	
Force pump	225.32	
Services, carriage of merchandise, E. J. Dillon	5,632.19	
Balance received by defendants on plaintiff's account for certain locomotives	6,397.60	
	$185,580.97	(Meixcan money)
FORWARD or	$92,935.48	(U. S. ")
BROUGHT FORWARD	92,935.48	(U. S. ")
Rental of freight cars	24,035.00	
Total due on said accounts	$115,970.48	
Credit due defendants for freight, etc.	98,681.83	
Balance due plaintiff on said account	$18,288.65	
SPECIFIC DAMAGES:		
Lost rental Aug. 1, 1921, to Oct. 15, 1922	378,760.25	
Value of locomotives seized under embargo treated as sale	317,300.00	
General damages to plaintiff's business	350,000.00	
	$1,064,348.90	(U. S. money)

No complaint has been filed or served herein. The defendants by Hardin and Hess, their attor-

neys, purporting to appear specially secured order, extending the time to appear or move with respect of the jurisdiction of the court or the service of a summons to November 28, 1922 (fol. 145), and thereafter removed the action to the District Court of the United States (fol. 131) which removal under the statute, extended the time to January 6, 1923, and thereafter by stipulation and order of Judge Knox secured further extension to move until January 13 (fol. 61).

The attached property as returned consists of office furniture and cash in the office of the Financial Agency and in the office of the National Railways of Mexico (fols. 101-3, 105-6).

The motion to dismiss was argued January 23, 1923, but Judge Knox delayed his decision after May 28, 1923, at which time he conferred with the counsel as he states in his opinion, believing that conferences between the commissioners of the United States of Mexico would be followed by recognition of Mexico by our Government.

Such delay was with the knowledge of the Department of State and against the vigorous protest of the plaintiff, and with the support of the defendant the Government of the United States of Mexico (fols. 149, 156, 163).

At the time when the motion was made the Government of Mexico had not been recognized by the United States, as appears in the letter of Secretary Hughes, to the Governor of the State of New York, dated December 27, 1922 (fols. 79-80), and the statement of Attorney General Daugherty, made in the court January 23, 1923 (fol. 117). As appears from the letters of Secretary Hughes to Judge Knox, embodied

in full in the opinion of Judge Knox complete and unconditional recognition was accorded to Mexico on August 31, 1923 (fols. 176, 181-2).

Assignments of Error.

FIRST: The Court erred in granting the motion of the defendants, The Government of the United States of Mexico and National Railways of Mexico, dismissing this action and vacating the warrant of attachment herein.

SECOND: The Court erred in granting judgment in favor of the defendants, The Government of the United States of Mexico and National Railways of Mexico, and against the plaintiff.

THIRD: The Court erred in holding that the defendants, The Government of the United States of Mexico and National Railways of Mexico are immune from the process of the courts except upon their consent for the reason that such Government had not, at the time of service of process herein or at the time when motion to dismiss was made, been recognized as a *de jure* or *de facto* government by the Government of the United States of America.

FOURTH: The Court erred in holding that the defendants, The Government of the United States of Mexico and National Railways of Mexico, are immune from the process of the courts for the reason that under the Constitution of the United States, the determination of the political status of a foreign government is to be made by the

President of the United States or the Department of State of the United States and the Government of the United States of Mexico had not, at the time of service of process herein or at the time of the making of the motion to dismiss, received recognition from such executive officers of the United States.

FIFTH: The Court erred in failing to hold that jurisdiction of the court over the subject-matter of the action and the persons of the defendants had fully attached and could not be divested by any subsequent facts.

SIXTH: The Court erred in holding that the District Court of the United States has no jurisdiction over the defendants, The Government of the United States of Mexico and National Railways of Mexico, for the reason that such decision is in violation of Section 2 of Article 3 of the Constitution of the United States which expressly provides that the judicial power shall extend to all cases in law between the citizens of a state and foreign states, citizens or subjects, and is likewise in violation of the statutes conferring judicial powers upon the said District Court of the United States.

SEVENTH: The Court erred in granting judgment for the reason that no complaint had been filed or served herein and the motion for dismissal was premature until the precise nature of the cause of action was set forth by complaint.

EIGHTH: The Court erred in granting judgment in favor of the defendants for the reason

that they failed to perfect the removal proceeding by pleading, answering or demurring within 30 days after removal as required by statute and the motion as made is not a pleading within the meaning of section 29 of the Judicial Code.

NINTH: The Court erred in holding that the defendants, The Government of the United States of Mexico and National Railways of Mexico, are immune from the process of the courts for the reason that such decision is in violation of the fourteenth amendment of the Constitution of the United States in that the defendants are granted immunity from legal liability to the plaintiff and thereby the plaintiff is deprived of its property without due process of law.

TENTH: The Court erred in holding that it had no jurisdiction over the defendants, The Government of the United States of Mexico and National Railways of Mexico, in this cause for the reason that said defendants were, at the time of the commencement of this action, doing business within the Southern District of New York.

ELEVENTH: The Court erred in holding that the defendants, The Government of the United of Mexico and National Railways of Mexico, are immune from the process of the courts for the reason that at the time of the commencement of this action the defendants, The Government of the United States of Mexico and National Railways of Mexico, were engaged in a commercial enterprise, to wit, the management and operation

for profit of a railway system and in connection therewith were doing business within the Southern District of the State of New York and the contract sued upon was made within the United States.

TWELFTH: The Court erred in ordering that the attachment herein be vacated and judgment entered dismissing the action for the reason that property of the defendants had been levied upon under said attachment situated within the Southern District of New York, which was being used in the carrying on of a commercial enterprise within said distirct.

THIRTEENTH: The Court erred in holding that the defendants, The Government of the United States of Mexico and National Railways of Mexico, were immune from the process of the courts for the reason that the Court delayed making a decision herein on the state of facts existing at the time of the commencement of this action and at the time of making of motion by the defendants for dismissal of this action at the urgency of said defendants and against the repeated and vigorous protests of the plaintiff to the Court, said delay being secured for the purpose and with the result that said defendant, The Government of the United States of Mexico, should secure recognition as a sovereign from the United States of America and thereby the defendants, having no special privileges or immunities, were enabled to secure a change in political status for the purpose of defeating the just cause of action of the plaintiff herein.

FOURTEENTH: The Court erred in holding that there was no jurisdiction over the defendants, The Government of the United States of Mexico and National Railways of Mexico, for the reason that said defendants, in and by the acts of their attorneys duly acting for them herein, waived immunity from suit, consented to the exercise of jurisdiction and appeared, generally, herein, particularly by making motions herein on grounds other than the absence of jurisdiction over the persons of the defendants by reason of immunity; and by making motions for purposes other than for dismissal because of such lack of jurisdiction; by seeking and acting upon orders and stipulation extending time to appear or make any motion with respect to the jurisdiction of the court as to cause of action herein, or to plead herein; by vacating the order for examination of Carlos R. Felix on grounds involving the existence and nature of the cause of action sued on; by removing this action from the Supreme Court of New York to the District Court of the United States; by appearing in court from time to time and delaying and hampering the plaintiff in the conduct of this action; by contesting the validity of the service of the summons herein and the jurisdiction over the subject-matter of this action; and by applying to the Court for an order dismissing the action with taxable costs and disbursements.

FIFTEENTH: The Court erred in dismissing the action as to the defendant, National Railways of Mexico, for the reason that the time of said defendant to appear or make any motion with

respect to the jurisdiction was extended on motion of Hardin & Hess, Esquires, as its attorneys by order of Justic A. S. Tompkins prior to the removal of this action from the Supreme Court of the State of New York to November 28th, 1922, and thereafter and subsequent to the removal to the District Court of the United States by stipulation dated January 4th, 1922, and the order of Honorable John C. Knox, thereon, said time to make any motion in respect to said action was extended to January 13th, 1923, and that no further extension to appear, answer, demur, plead or make any motion herein had been secured by said defendant, National Railways of Mexico and that at all times since January 13th, 1923, said defendant has been in default herein and has not appeared or pleaded as required by Section 29 of the Federal Judicial Code.

POINT I.

The renunciation by the Federal Court of Jurisdiction in an action by a citizen, against a foreign state, is in direct violation of article 3, section 2, sub-division 1, of the Constitution, and section 24, sub-division 1, of the Judicial Code, extending the judicial power to controversies between citizens of a state and foreign states.

This case raises a great constitutional question of first impression. The only decision of the Supreme Court of the United States, limiting the natural import of the clause, is that of *The Schooner Exchange* v. *McFaddon*, 7 Cranch 116, holding that a public armed vessel, in the service

of France, could not be libelled by her alleged owners. This case was decided in 1812. Mr. Justice Marshall makes no mention of the constitutional provisions, but does assert in the most emphatic way that the jurisdiction of the nation, within its own territory, is necessarily exclusive and absolute, and is susceptible of no limitation not imposed by itself. At the time of the adoption of the Constitution there was no rule of the Common Law or of Internationl Law, nor in common usage, conferring immunity, except the immunity conferred upon ambassadors or ministers to enable them to perform their public functions. The earliest English case, giving immunity to a foreign sovereign appears to have been that of the *Duke of Brunswick* v. *The King of Hanover*, 6 Beav. 1, decided by Lord Langdale, Master of the Rolls, in 1843, and affirmed by the House of Lords, 2 H. L. Cas. 1.

foreign sovereign, appears to have been that of

The effect of *Chisholm Executor* v. *Georgia*, 2 Dal. 419, permitting a citizen to sue a state, was nullified by the eleventh amendment to the Constitution, so far as actions against a state are concerned, but the amendment, in no wise, affects actions against foreign states, and nearly all that was stated in the prevailing opinions in that case is applicable to the case at bar. Can it be doubted that in 1793 this Court would have held that a foreign state was subject to its jurisdiction?

Answering the contention that a state could be plaintiff, but not defendant, Mr. Justice Blair says, at page 451:

> "And is the whole force of that expression satisfied by confining its meaning to the case

> of a plaintiff State? It seems to me that if this court should refuse to hold jurisdiction of a case where a State is defendant, it would renounce part of the authority conferred, and consequently part of the duty imposed upon it by the Constitution; because it would be a refusal to take cognizance of a case where a State is a party."

Mr. Justice Wilson, after pointing out that man is greater than the state, and that a state must be considered subordinate to the people, says at page 456:

> "The only reason, I believe, why a free man is bound by human laws, is that he binds himself. Upon the same principles, upon which he becomes bound by the laws, he becomes amenable to the courts of justice, which are formed and authorized by those laws. If one free man, an original sovereign, may do all this, why not an aggregate of free men, a collection of original sovereigns, do this likewise? If the dignity of each singly is undiminished, the dignity of all jointly must be unimpaired. A State, like a merchant, makes a contract; a dishonest State, like a dishonest merchant wilfully refuses to discharge it; the latter is amenable to a court of justice. Upon general principles of right shall the former, when summoned to answer the fair demands of its creditor, be permitted, Proteus-like, to assume a new appearance, and to insult him and justice by declaring I am a sovereign State? Surely not."

Commenting on English Law, he says, at page 461:

> "In England, according to Sir William Blackstone, no suit can be brought against

the king, even in civil matters. So, in that kingdom, is the law at this time received. But it was not always so. Under the Saxon government, a very different doctrine was held to be orthodox."

* * * *

"'Judges ought to know that the poorest peasant is a man as well as the king himself; all men ought to obtain justice, since, in the estimation of justce, all men are equal; whether the prince complain of a peasant, or a peasant complain of the prince.' These are the words of a king,—of the late Frederic of Prussia. In his courts of justice, that great man stood upon his native greatness, and disdained to mount upon the artificial stilts of sovereignty."

* * * *

"Concerning the prerogative of kings, and concerning the sovereignty of States, much has been said and written; but little has been said and written concerning a subject much more dignified and important, the majesty of the people."

In support of his conclusion that the State of Georgia is amenable to the jurisdiction of the court, he says, at page 466:

"But in my opinion, this doctrine rests not upon the legitimate result of fair and conclusive deduction from the constitution; it is confirmed, beyond all doubt, by the direct and explicit declaration of the Constitution itself. 'The Judicial power of the United States shall extend to controversies between two States.' Two States are supposed to have a controversy between them; this controversy is supposed to be brought before those vested with the judicial power

> of the United States; can the most consummate degree of professional ingenuity devise a mode by which this 'controversy between two states' can be brought before a court of law, and yet neither of those States be a defendant? 'The judicial power of the United States shall extend to controversies between a State and citizens of another State.'' Could the strictest legal language; could even that language which is peculiarly appropriated to an art, deemed by a great master to be one of the most honorable, laudable, and profitable things in our law; could this strict and appropriated language describe with more precise accuracy, the cause now depending before the tribunal? Causes, and not parties to causes, are weighed by justice in her equal scales; on the former, solely, her attention is fixed; to the latter she is, as she is painted, blind.''

Mr. Justice Cushing expressly comments on the language of the clause as applicable to a foreign state. He says, at page 467:

> ''It may be suggested that it could not be intended to subject a State to be a defendant, because it would affect the sovereignty of States. If that be the case, what shall we do with the immediate preceding clause: 'controversies between two or more States,' where a State must of necessity be defendant? It it was not the intent, in the very next clause also, that a State might be made defendant, why was it so expressed as naturally to lead to and comprehend that idea? Why was not an exception made if one was intended.
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> ''Again, what are we to do with the last clause of the section of judicial powers, namely, 'controversies between a State or

the citizens thereof, and foreign States or citizens?' Here, again, States must be suable or liable to be made defendants by this clause, which has a similar mode of language with the two other clauses I have remarked upon. For if the judicial power extends to a controversy between one of the United States and a foreign States, as the clause expresses, one of them must be defendant. And then what becomes of the sovereignty of States, as far as suing affects it? But although the words appear reciprocally to affect the State here and a foreign State, and put them on the same footing as far as may be, yet ingenuity may say that the State here may sue, but cannot be sued; but that the foreign State may be sued but cannot sue. We may touch foreign sovereignties but not our own. But I conceive the reason of the thing, as well as the words of the Constitution, tend to show that the federal judicial power extends to a suit brought by a foreign State, against any one of the United States. One design of the general government was for managing the great affairs of peace and war, and the general defence, which were impossible to be conducted with safety by the States separately. Incident to these powers, and for preventing controversies between foreign powers, or citizens from rising to extremities and to an appeal to the sword, a national tribunal was necessary, amicably, to decide them, and thus ward off such fatal public calamity. Thus States at home and their citizens, and foreign States and their citizens, are put together without distinction upon the same footing, as far as may be, as to controversies between them. So also with respect to controversies between a State and citizens of another State at home, comparing all the

> clauses together the remedy is reciprocal; the claim to justice equal. As controversies between State and State, and between a State and citizens of another State might tend gradually to involve States in war and blood shed, a disinterested civil tribunal was intended to be instituted to decide such controversies, and preserve peace and friendship. Further; if a State is entitled to justice in the federal court, against a citizen of another State, why not such citizen against the State, when the same language equally comprehends both? The rights of individuals and the justice due to them are as dear and precious as those of States. Indeed the latter are founded upon the former, and the great end and object of them must be to secure and support the rights of individuals or else vain is government."

Chief Justice Jay points out that whatever immunities may exist in Europe, in favor of the sovereign, such prerogatives have no place in America. He says, at page 471:

> "It will be sufficient to observe, briefly, that the sovereignties in Europe, and particularly in England, exist on feudal principles. That system considers the prince as the sovereign, and the people as his subjects; it regards his person as the object of allegiance, and excludes the idea of his being on an equal footing with a subject, either in a court of justice or elsewhere. That system contemplates him as being the fountain of honor and authority; and from his grace and grant derives all franchises, immunities, and privileges; it is easy to perceive that such a sovereign could not be amenable to a court of justice, or subjected to judicial control and actual constraint. It was of

necessity, therefore, that suability became incompatible with such sovereignty. Besides, the prince having all the executive powers, the judgment of the courts would, in fact, be only monitory, not mandatory to him, and a capacity to be advised, is a distinct thing from a capacity to be sued. The same feudal ideals run through all their jurisprudence, and constantly remind us of the distinction between the prince and the subject. No such ideas obtain here; at the revolution the sovereignty devolved on the people; and they are truly the sovereigns of the country, but they are sovereigns without subjects, unless the African slaves among us may be so called, and have none to govern but themselves; the citizens of America are equal as fellow-citizens, and as joint-tenants in the sovereignty.

"From the differences existing between feudal sovereignties and governments founded on compacts, it necessarily follows that their respective prerogatives must differ. Sovereignty is the right to govern; a nation or state sovereign is the person or persons in whom that resides. In Europe the sovereignty is generally ascribed to the prince, here it rests with the people; there, the sovereign actually administers the government, here, never in a single instance; our governors are the agents of the people, and, at most, stand in the same relation to their sovereign in which regents in Europe stand to their sovereigns. Their princes have personal powers, dignities, and pre-eminences, our rulers have none but official; nor do they partake in the sovereignty otherwise, or in any other official capacity, than as private citizens.

"The second object of inquiry now presents itself, namely, whether suability is compatible with state sovereignty.

"Suability by whom? Not by a subject, for in this country there are none; not an inferior, for all the citizens being as to civil rights perfectly equal, there is not, in that respect, one citizen inferior to another. It is agreed that one free citizen may sue another; the obvious dictates of justice and the purposes of society demanding it. It is agreed, that one free citizen may sue any number on whom process can be conveniently executed; nay, in certain cases one citizen may sue forty thousand; for where a corporation is sued all the members of it are actually sued, though not personally sued. In this city there are forty odd thousand free citizens, all of whom may be collectively sued by any individual citizen. In the State of Delaware there are fifty odd thousand free citizens, and what reason can be assigned why a free citizen who has demands against them should not prosecute them? Can the difference between forty odd thousand and fifty odd thousand make any distinction as to right?"

Dealing with the specific matters to which the judicial power extends, he says at page 476:

"10th. To controversies between a State or the citizens thereof and foreign States; citizens or subjects; because, as every nation is responsible for the conduct of its citizens towards other nations, all questions touching the justice due to foreign nations, or people, ought to be ascertained by, and depend on, national authority. Even this cursory view of the judicial powers of the United States leaves the mind strongly impressed with the importance of them to the preservation of the tranquillity, the equal right of the people.

"The question now before us renders it necessary to pay particular attention to that

part of the second section which extends the judicial power 'to controversies between a State and citizens of another State.' It is contended that this ought to be construed to reach none of these controversies, excepting those in which a State may be plaintiff. The ordinary rules for construction will easily decide whether those words are to be understood in that limited sense.

"This extension of power is remedial, because it is to settle controversies. It is, therefore, to be construed liberally. It is politic, wise and good, that not only the controversies in which a State is plaintiff, but also those in which a State is defendant, should be settled; both cases, therefore, are within the reason of the remedy; and ought to be so adjudged, unless the obvious, plain, and literal sense of the words forbid it. If we attend to the words we find them to be express, positive, free from ambiguity, and without room for such implied expressions: 'The judicial power of the United States shall extend to controversies between a State and citizens of another State.' If the Constitution really meant to extend these powers only to those controversies in which a State might be plaintiff, to the exclusion of those in which citizens had demands against a State, it is inconceivable that it should have attempted to convey that meaning in words not only so incompetent, but also repugnant to it; if it meant to exclude a certain class of these controversies, why were they not expressly excepted; on the contrary, not even an intimation of such intention appears in any part of the Constitution. It cannot be pretended that where citizens urge and insist upon demands against a State, which the State refuses to admit and comply with, that there is no controversy between them.

If it is a controversy between them, then it clearly falls not only within the spirit, but the very words of the Constitution. What is it to the cause of justice, and how can it affect the definition of the word controversy, whether the demands which cause the dispute are made by a State against citizens of another State, or by the latter against the former? When power is thus extended to a controversy, it necessarily, as to all judicial purposes, is also extended to those between whom it subsists.

"The exception contended for would contradict and do violence to the great and leading principals of a free and equal national government, one of the great objects of which is to insure justice to all. To the few against the many, as well as to the many against the few. It would be strange, indeed, that the joint and equal sovereigns of this country should, in the very Constitution by which they professed to establish justice, so far deviate from the plain path of equality and impartiality, as to give to the collective citizens of one State a right of suing individual citizens of another State, and yet deny to those citizens a right of suing them."

* * * *

"It is useful, because it is honest; because it leaves not even the most obscure and friendless citizen without means of obtaining justice from a neighboring State; because it obviates occasions of quarrels between States on account of the claims of their respective citizens; because it recognizes and strongly rests on this great moral truth, that justice is the same whether due from one man or a million, or from a million to one man; because it teaches and greatly appreciates the value of our free republican national government, which places all our

> citizens on an equal footing, and enables each and every of them to obtain justice without any danger of being overborne by the weight and number of their opponents; and because it brings into action, and enforces this great and glorious principle, that the people are the sovereign of this country, and consequently that fellow-citizens and joint sovereigns cannot be degraded by appearing with each other in their own courts to have their controversies determined."

Shortly after the decision of the *Chisholm* case, the Supreme Court asserted the authority of the courts of the United States to direct restitution of prizes, made by cruisers in violation of neutrality. This decision was made in *Glass* v. *The Sloop Betsey,* 3 Dall 6, decided in 1794. Like result was reached in *Santissima Trinidad,* 7 Wheaton 283 (1822), and the power was reasserted in Steamship *Appam,* 243 United States 124 (1917). No fear that the sovereign power involved might deny jurisdiction of the court or assert title to the alleged prize, when upon the high seas deterred the court from asserting its jurisdiction, even at a time when the national power was relatively insignificant, and the antagonisms of foreign nations strongly aroused.

In 1810, in the case of the *King of Spain* v. *Oliver,* 2 Wash. C. C. 429, it was said:

> "Without going through the English cases which have been cited, it is sufficient to observe, that the Constitution of the United States gives jurisdiction to the courts of the United States, in cases where foreign states are parties; and the judicial act gives jurisdiction to the circuit courts in all cases

> between aliens and citizens. Whether this suit can be supported, if prosecuted in the name of the King of Spain, generally, or whether Ferdinand VII can support the action before he is acknowledged by our government, are questions not proper to be decided on motion."

Surprisingly little is said of the constitutional provision as to suits between citizens and foreign sovereigns, until very recently, either by the courts or by writers. In Justice Miller's work on the Constitution, published in 1891, that distinguished judge seems to have no question that a citizen can sue a foreign state provided he can make service of process. At page 330, he says, of the judicial power of the United States:

> "Finally, it is extended to controversies, 'between a State, or the citizens, thereof, and foreign States, citizens, or subjects.' Every foreign state, or any of its citizens, is entitled to sue any of our citizens in the Federal courts, and if a citizen of this country can get service of process upon them, he has a right to sue them in the same tribunals."

That a foreign sovereign can bring a civil suit, and that such suit does not abate upon a change in the person of the sovereign, was held in *The Sapphire*, 78 United States 164 (1870).

In the *Republic of Columbia* v. *Cauca Company*, 106 Federal 337 (C. W. Va. 1901), Judge Goff says:

> "First, the question of jurisdiction is to be disposed of. The republic of Columbia is a foreign state, within the meaning of

those words as used in the Constitution of the United States, and as such it has the right to maintain a suit in this court, against any party found within this district, concerning any subject matter of which this court has jurisdiction."

In this case reported in 190 United States 524 (1903) it was held that a sovereign power has the right to appeal to the Supreme Court. Justice Holmes says:

"We are of opinion that it had the right to appeal. The Circuit Court had jurisdiction under the Constitution, article 3, section 2, and the act of August 13, 1888, c. 866, 1, 25 Stat. 434, as the suit is 'a controversy between citizens of a State and foreign States, citizens, or subjects,' within the words and meaning of the act. *The Sapphire*, 11 Wall 164, 167."

* * * *

"We see no reason to doubt that Congress was as well aware of the distinction between foreign States and foreign citizens when it passed the act of 1891 as when it passed the act of 1888, and that when it spoke of aliens it means foreign citizens alone."

The case of *H. J. Decker & Company* v. *The Railway Company*, 189 Federal 224 (C. N. Ala. 1911), holds that the grant of jurisdiction, under discussion, includes suits against, as well as those instituted by aliens.

There is no generally accepted doctrine of International Law, that under no circumstances, can a foreign sovereign be made party to a suit. Even in England, where the doctrine was given

a very broad application in the *Parlement Belge*, L. R. 5 P. D. 197 (1880), there are exceptions, and the sweeping statements of immunity in certain cases relying upon that decision, must be taken with reserve and require re-examination. Certainly this court cannot lightly emasculate a constitutional provision by an extension of the doctrine of immunity which would render such constitutional protection completely nugatory, so far as actions against foreign states are concerned.

The interpretation of the constitutional provision denying jurisdiction remits the American citizen, who may secure speedy and certain justice, according to law, before the courts, to an unequal diplomatic contest, with a foreign nation, or resort to an expensive litigation, in a remote forum for such measure of relief as it may be willing to afford in its own tribunals.

Everywhere in international relations there has, in recent years, been a strong effort to substitute determination in accordance with law for more uncertain methods of diplomacy, arbitration or resort to force. Just as in the field of private, municipal law the struggle for law of which Von Ihering writes, has almost eliminated self-help and non-rational methods of trial; so in the international field the effort is to settle all justiciable disputes by an appeal to law. The Hague Tribunal and the World Court are the result of this effort. The Constitution has conferred upon the federal courts jurisdiction of actions between citizens and foreign states. Why should this court refuse the jurisdiction, except perhaps in such a case as the Schooner *Exchange*

where the seizure of a ship of war might readily be a *casus belli?* Wherever the court deals with an action in which it can, without resort to force by the means of the usual machinery, available to the court, satisfy the just demands of a private litigant it should take jurisdiction and not add to the controversies to be decided by the uncertain and tedious methods of diplomacy.

POINT II.

The denial of legal relief by a Federal Court to the citizens of the United States for breach of contract or tort committed by a foreign government or its agencies is in violation of the Fifth Amendment to the Constitution of the United States, that no person shall be deprived of life, liberty or property without due process of law.

The plaintiff is powerless to prevent removal of an action against a foreign state or subordinate administrative bureau thereof, from the State Courts to the Federal Court. The right to resort to the national courts is a national right, guaranteed by the Constitution. The necessary effect of the decision at bar is that the financial agency of Mexico in the City of New York or the National Railways of Mexico, Government Administration, in the City of New York, may make and violate contracts with impunity and may commit torts for which the victim has no legal redress, except perhaps against the individual agent who may be entirely irresponsible.

In *United States* v. *Lee,* 106 U. S. 196 (1882) Mr. Justice Miller discusses the applicability of

the 5th Amendment to the contention that an officer of the United States could not be sued in ejectment where such officer was in possession of land for public uses of the United States. Mr. Justice Miller says:

> "The objection is also inconsistent with the principle involved in the last two clauses of article 5 of the amendments to the Constitution of the United States, whose language is: 'That no person * * * shall be deprived of life, liberty, or property without due process of law, nor shall private property be taken for public use without just compensation.' "

Somewhat analogous cases where the Supreme Court has held the 14th Amendment violated by judgments of State Courts, injurious to the property rights of the citizens, are *Scott* v. *McNeal*, 154 U. S. 34 (1894); *Muhlken* v. *The Harlem Railroad Company*, 197 U. S. 544 (1905).

In cases where foreign governments have engaged in far reaching nationalization of transportation or industry, seizing property and violating contracts without due compensation to the citizens of foreign countries, it is wholly contrary to the American principles of protection of the rights of individuals to deny them legal redress in their own courts, when the very governments which have thus acted have large amounts of property, available within the jurisdiction to satisfy judgments at law.

POINT III.

The Government of the United States of Mexico has no immunity in an action upon a contract made in the United States, by which locomotives and cars were to be furnished and operated on a system of railways, owned by a private corporation, but operated by the Government, such Government administration regularly maintaining an office and transacting business of said railways in New York City.

Whatever position the court may take as to the constitutionality of general immunity from suit of foreign states, certain differentiating facts take this case out of any such general rule. The dominating factors urged, are:

(A) The action is for breach of certain commercial contracts (fols. 33-7).

(B) The Government is engaged in a non-governmental enterprise.

(C) The railway system operated, is owned by a private corporation. The Mexican Government may be said to be operating a requisitioned railway system (fols. 71-2; 111-15).

(D) The government administration maintains a permanent office and regularly transacts the railway business within the State of New York and also regularly transacts business at a financial agency, maintained in the State of New York, and personal service has been made upon the managing agents of the defendant in charge of said offices (fols. 40-1, 55, 75-78, 83-4, 101-6).

The case in this aspect is one of first impression. No case in any jurisdiction has come to the attention of plaintiffs' counsel where the foreign government was regularly transacting business within the jurisdiction of suit.

A brief historical review of the decided cases and authorities on internatonal law seems necessary to show how very recently the doctrine of general immunity has arisen. Such an examination will make clear the basis and extent of immunity as to which loose and ill-considered dicta have been expressed, particularly in decisions, subsequent to the World War. In the main, this examination is confined to cases dealing with the immunity of foreign countries. As Mr. Justice Holmes points out in *Kawananakoa* v. *Polyblank*, 205 United States 349 (1907), a sovereign in his own courts is exempt from suit "On the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." In the case of a foreign state the jurisdictional sovereign has power to deal with all persons and property within the territory, and immunity is granted on grounds of comity, only in cases consonant with the national interest. The distinction is obvious from the fact that nowhere is immunity granted as to real property owned by a foreign sovereign.

English Law.

Prior to 1843 the English cases appear to deal exclusively with the question of the immunity of diplomatic officers or consuls.

One of the earliest cases is that of *Mattueof*, 10 Mod. 4 (1710) in which Sir James Montague, Attorney General, is stated to have answered in

the negative the question whether an ambassador could be arrested for debt.

The act of 7 Anne, Chapter 12, growing out of the seizure of the Russian ambassador provided:

> "That all writs and processes whereby the person of any ambassador or the public minister of any foreign prince or state, authorized and received as such by her Majesty, or the domestic servant of any such Ambassador, or other public minister, may be arrested or imprisoned, or his or their goods or chattels may be distressed, seized or attached, shall be deemed null and void; but it is provided, that no merchant or other trader, whatsoever, within the Statutes of Bankrupts, who shall put himself in the service of such ambassador, etc., shall have any manner of benefit of this act."

In view of the fact that the leading authority for holding that a vessel employed in a trading voyage, owned or requistioned by a sovereign, is immune from libel, is that of *The Porto Alexandre,* L. R. (1920) Prob. 30, and that Lord Justice Scrutton in that case lays stress upon a statement of Chief Justice Jervis in *Taylor* v. *Best,* 14 C. B. 487 (1854), that the statute of Anne forfeited immunity where an ambassador's servant, engaged in trade, but not where the ambassador himself was so engaged, the more nearly contemporary explanation of Talbot, Lord Chancellor in *Barbuit's* case *Tempore* Talbot 281 1737), is of interest. Lord Talbot decided that a commissioner as agent of commerce from the King of Prussia in Great Britain had no immunity. The Lord Chancellor, says:

> "And the exception of persons trading relates only, to their servants, the Parliament

never imagining that the ministers themselves would trade."

• • • •

"But what creates my difficulty is, that I do not think he is intrusted to transact affairs between the two crowns; the commission is, to assist his Prussian Majesty's subjects here in their commerce; and so is the allowance. Now this gives him no authority to intermeddle with the affairs of the King; which makes his employment to be in the nature of a consul."

• • • •

"It is the opinion of Barbeyrac, Wincquefort and others, that a consul is not entitled to the *jus gentium* belonging to ambassadors."

The law was similarly stated as to consuls or agents of commerce by Chief Justice Mansfield in *Heathfield* v. *Clinton*, 4 Burr. 2015 (1767), as follows:

"The Law of Nations does not take in any consuls, or agents of commerce; though received as such by the courts to which they are employed. This was determined in Barbuit's lease in Canc, which was so solemnly argued before and determined by Lord Talbot on considering and well weighing Barbeyrac, Binkershoek, Grotius, Wincquefort and all the foreign authorities (for there is little said by our own writers on this subject)."

The first case dealing with the personal immunity of an individual sovereign is that of the *Duke of Brunswick* v. *The King of Hanover, supra,* which was a bill praying to have an

instrument appointing the defendant guardian of the plaintiff, adjudged void and for an account of real and personal property in England. It was held that the defendant was not subject to the jurisdiction of the court for the acts alleged under the instrument. The Master of the Rolls, Lord Langdale, reviewed the law carefully, stating that there have been cases in which the court, being called upon to distribute a fund in which some foreign sovereign or state may have had an interest has thought it expedient in order to a due distribution of the fund, to make such sovereign or state a party. He adds:

> "On the other hand, no case has been produced in which, upon the question properly raised, it has been held that a sovereign prince, resident within the dominions of another prince, is exempt from the jurisdiction of the country in which he is."

He states the basis of his decision to be:

> "And for these reasons I am of opinion, that His Majesty the King of Hanover is and ought to be exempt from all liability of being sued in the courts of this country, for any acts done by him as King of Hanover, or in his character of sovereign prince, but that, being a subject of the Queen, he is and ought to be sued in the courts of this country, in respect of any acts and transactions done by him, or in which he may have been engaged as such subject."

This order was affirmed, 2 H. L. C. 1 (1848). Lord Cottonham, Lord Chancellor, does not appear to deal with the question on the ground of immunity or any doctrine of ex-territoriality, but puts the decision on the ground that a foreign

sovereign cannot be held for acts done in his sovereign character in his own country. He says:

> "That is the sole question; therefore I avoid the question which does not necessarily arise;—how far a foreign sovereign, coming into this country, is amenable at all. I do not enter upon that question, because it does not necessarily arise upon the proper disposal of the matter now before us, as I am of opinion that, upon the face of this bill, the allegations show that the acts could not have been done, and were not done in any private character, but that they were done, whether right or wrong, in the character of the sovereign of a foreign state."

In *De Haber* v. *the Queen of Portugal*, 17 Q. B. 196 (1851) the rule laid down is, that moneys, belonging to a foreign sovereign, may not be attached. Campbell, Chief Justice, indicates that the sovereign should be entitled to the same immunity as the minister representing him. He discredits the authority of Bynkershoek, stating that this author is well-known to have an antipathy to crowned heads and to monarchial government. He als doubts the authenticity of the statement of Lord Chancellor Thurlow that the King of Spain had once been outlawed by Selden's advice.

Similar in effect is the case reported at the same time of *Wadsworth* v. *Queen of Spain*, 17 Q. B. 171 (1851).

In 1862 an injunction was granted in *Gladstone* v. *Musurus Bey*, 1 Hemming and Miller 495, (1862) restraining the withdrawal of certain securities, deposited by plaintiffs in the Bank of England in the name of the Ambassador of Tur-

key to secure the performance of a contract between the plaintiffs and the foreign government. The Ambassador threatened to withdraw the deposit on the ground of an alleged breach of contract. Wood, Vice-Chancellor says:

> "So also in this case, it appears to me, that though I cannot hold this gentleman here, because he is an Ambassador, yet the fund being here, this Court has jurisdiction to prevent that fund being wasted, and perhaps all the more on account of the impossibility of withdrawing the fund from the hands of the Ambassador if once it reaches them. Therefore, all that remains is to consider whether the Bank of England will be protected by this order. It appears to me that the Bank will be amply protected, because, if the Turkish Ambassador should present his cheque, the Bank, under the order of this Court, would decline to honour it; and the only mode in which the Ambassador could compel payment, would be by taking some process of his own. I feel a very strong opinion, that, if he chose to take that course, the position of things would be entirely altered. He would be submitting himself to the jurisdiction of our tribunals; and in that case English tribunals would have the power of saying, for that purpose only, that they would administer justice between all parties concerned in a litigation which he had himself commenced."

A similar question as to the right to join a foreign sovereign as a party defendant arose in the case of *Lariviere* v. *Morgan*, L. R. 7 Ch. 550 (1872).

The plaintiff had entered into a contract with the Minister of War for the Government of National Defence in France to supply cartridges.

A special credit was opened with Messrs. Morgan & Gooch, bankers in London, financial agents for the French Government, to be paid upon delivery of the goods upon certificates to be issued by the French ambassador or M. Joulin, the French agent in England. Thereafter, the French officers refused to inspect or accept any more cartridges. The plaintiff filed a bill against the bankers and the nine persons who had formed the government of the National Defence, which bill was afterwards amended by striking out the members of the government making the French Republic a defendant. A co-contractor who had withdrawn from the contract, was also joined. The French Government did not appear. It was held that the plaintiff was entitled to payment for all cartridges delivered.

Lord Hatherly, L. C., states that a plain and clear trust, had been impressed upon the funds under which those who had the benefit of the trust would be entitled if they performed their contract to receive the money. Lord Hatherly L. C. says:

> "The main argument in the case has, however, been that the French Government, though it has an undoubted interest in the fund, is not before the Court; and that even if the whole contract had been fulfilled to the day, the French Government is still entitled to the balance which will remain, and is therefore entitled to see that the payments have been properly made. But it is clear, upon the authorities, that the plaintiff cannot compel them to come here and submit to the jurisdiction of this country. They may appear as has been done in other cases. The United States have filed bills

in this country and have submitted to the jurisdiction, and thereupon have had their rights ascertained. But the question now raised is, whether, in the absence of the French Government, it is possible to ascertain the rights to this particular fund, the French Government declining to appear—a very proper course to take if they think fit."

* * * *

"In answer to this I will put the case of a foreign government having placed in this country a sum of money, and having charged it with certain trusts to be performed, subject to which the balance is to be paid back to the foreign government. Is it possible to say that in such a case the trustee is not liable to perform the trust because the foreign government, one of the *cestuis que* trust, cannot be made to appear? There is great analogy between this case and the case of an interpleader suit."

* * * *

"In any such case we must ascertain as we best can, in the absence of the other parties, what are the rights of the parties who do appear."

* * * *

"Messrs. Morgan & Gooch, however, say that they will be liable to the consequences of any proceeding that may be instituted in France by the French Government, who might say that the fund was not to be handed over except upon the certificate of the ambassador. But I apprehend that the comity of nations would extend to such a

case, and that the decision of this Court will be respected, as we should respect a decision of a Court in France with reference to any fund which was clearly within the jurisdiction of that Court, and which had to be dealt with upon facts which had taken place in that country. Moreover I apprehend that neither in that Court nor in any Court in any civilized country would it be held that where the certificate of a French ambassador is required a person would lose his money because, for instance, there happened to be no ambassador.

I stand, however, upon higher ground, for I assume that the Courts of all countries would recognize the decision of a Court of competent jurisdiction in a country where the property was situated, and where the rights were properly to be tried."

This case was reversed by the House of Lords L. R. 7 H. L. 423 (1873) on the ground that a letter opening a credit does not of itself constitute an equitable assignment or specific appropriation so as to create a trust, but the soundness of Lord Hatherly's view below, had there been a trust, is recognized. Lord Cairns, Lord Chancellor says:

"My Lords, if that view of the letter to which I have referred was well founded, it would no doubt avoid the necessity of considering the position of the Government of France, which was said to be interested in the subject of the suit, but which did not, although the opportunity was given, think fit to appear in the Court of Chancery. No doubt, under such circumstances, the Court, having a trust fund under its control, might well proceed to administer that fund, even although a foreign government

might be interested in it, and might not be before the Court, or subject to the jurisdiction of the Court."

In 1873 the question of immunity where a sovereign has assumed the character of a trader, emerges in *The Charkieh*, L. R. 4 A. & E. 59. This was an action in admiralty in *rem* to recover a loss by collision on the Thames.

The libelled vessel, *The Charkieh*, was the property of the Khedive of Egypt, and though carrying the flag of the Ottoman navy had come with cargo to England and been entered like an ordinary merchant ship and was under charter to a British subject to carry cargo to Alexandria. Held, by Sir Robert Phillimore, that the Khedive was not a sovereign and moreover, a suit *in rem* to enforce a damage lien may be entertained and thirdly, if a sovereign assumes the character of a trade, he must be considered to have waived any privilege which might otherwise attach to the vessel.

Phillimore says: "The universally acknowledged exceptions to the general rule of the sovereign's immunity when examined prove the truth of this proposition. For instance, the exemption from suit is admitted not to apply to immovable property. One reason may be that the owner of such property has so incorporated himself into the jural system of the state in which he holds such property, that the argument of general inconvenience to states from allow- the exemption outweighs the argument from convenience on which the exemption in other matters is bottomed. But another reason surely is that which seems to be suggested by Jervis, *C. J.*, in *Taylor* v. *Best* (1), that

> such a suit can be carried on without the necessity of serving process upon the sovereign, or of interfering in any way with such personal property as may be requisite for the due discharge of his functions. The exemption must be taken away for one of three reasons, either those which I have suggested, or a third, that the acquisition of immovable property amounts to a waiver of privilege."

In *Vavasseur* v. *Krupp*, L. R. 9 Ch. Div. 351 (1878), the English courts appear to go very far in protecting the ownership of a foreign sovereign, at least as regards property clearly of a public nature. Here agents had possession of certain shells, the property of the Mikado of Japan, purchased in Germany. It was claimed in England that they were an infringement upon a patent. The case held that in spite of an injunction, granted against the agents in whose possession the shells were, the Mikado could procure an order that such injunction was ineffective as against him.

In 1879, Sir Robert Phillimore, himself a writer on International Law, decided the Parlement Belge L. R. 4 Prob. Div. 129, holding that a mail-packet, the property of the Crown of Belgium, carrying a royal pennon, and officered by commissioned officers of the Royal Belgian navy, and carrying on commerce was not immune from an action for damage caused by collision in the harbor of Dover. Sir Robert Phillimore quotes at length from Judge Story's opinions, both in the *United States* v. *Wilder*, 3 Sum. 315, and the *Santissima Trinidad*, *supra*, and says:

> "Upon the whole, I am of opinion that neither upon principle, precedent, nor analogy of general international law, should I be warranted in considering the Parlement Belge as belonging to that category of public vessels which are exempt from process of law and all private claims."

This decision, however, was reversed upon appeal reported L. R. 5 Prob. Div. 197 (1880). Lord Justice Brett, stating the principle as follows:

> "The principle to be deduced from all these cases is that, as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign state to respect the independence and dignity of every other sovereign state, each and every one declines to exercise by means of its Courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any state which is destined to public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and, therefore, but for the common agreement, subject to its jurisdiction."

The Parlement Belge has become the ruling authority and has been relied upon in a number of American decisions. As, however, Phillimore found that the special duty of the packet was the conveyance of the mails, it is not a clean cut commercial case.

Parkinson v. *Potter*, L. R. 16 Q. B. D. 152 (1885) held that the payment of a parochial rate was not enforceable against an attache of a foreign em-

bassy. Wills *J.*, touches on the question of trade as follows:

> "In *Novello* v. *Toogood* (4) it was held that the goods of a chorister in the service of the Portuguese ambassador were not privileged from distress for poor-rates. But in that case the servant was carrying on the business of a lodging-house keeper in the house in question. Most writers on international law say that with regard to an ambassador even, although he does not lose his privileges as an ambassador by engaging in trade in the country to which he is accredited, yet the immunity of his goods does not extend to protect his stock-in-trade. The *ratio decidendi* in *Novello* v. *Toogood* (4) is that the plaintiff Novello, who claimed exemption from poor-rate, was carrying on the business of a lodging-house keeper in the house in question."

Mighell v. *Sultan of Johore*, L. R. (1894) 1 Q. B. 149 is an extreme case of immunity, allowed to the personal sovereign, but is not necessarily applicable where the maintenance of suit would not interfere with the personal activities of the ruler. In this case a foreign sovereign resided in England, under an assumed name, and the action is brought for breach of a promise to marry made in England. The case held that an order for substituted service must be set aside on the ground that no action can be maintained against a sovereign and that there can be no submission to the jurisdiction by mere conduct at a previous time, but only when such jurisdiction has been invoked.

In 1918 it was held in *The Crimdon*, 35 T. L. R. 81 that a boat is immune from process in a collision case, it being under charter to the United States Shipping Board Emergency Fleet Corporation, and being employed in the Army transport service.

Mr. Justice Hill comments on the unfortunate results of the rule of law followed, saying:

> "It is in my view a great hardship upon the persons who have claims against such privately-owned vessels that they should lose their most substantial remedy; and in the interest of safe navigation it is most unfortunate that there should be a great number of vessels, navigating the seas whose owners know that however negligently they may be navigated, no maritime lien can be enforced upon the vessel while she is in State employment."

The most sweeping English decision, giving immunity to a vessel, employed in ordinary trading voyages, carrying cargoes for private individuals is that of *The Porto Alexandre, supra.* Hill, Justice, in giving judgment, below, said that he had arrived at the decision with the greatest reluctance, but that in his view the law laid down in the Parlement Belge was that a foreign state could not be impleaded either by served in personam or indirectly by proceedings against its property; and if that were the principle it mattered not how the property was being employed. He adds:

> "I have already, in previous cases, pointed out what I conceive to be very strong reasons why it is undesirable that cases should be withdrawn, as this is being withdrawn,

from the Courts, but I have only to assert now what I conceive to be the law."

Bankes, Lord Justice, speaks of the growing importance of the question as follows:

"In the days when the early decisions were given, no doubt what were called Government vessels were confined almost entirely, if not exclusively, to vessels of war. But in modern times sovereigns and sovereign states have taken to owning ships, which may to a still greater extent be employed as ordinary trading vessels engaged in ordinary trading. That fact of itself indicates the growing importance of the particular question if vessels so employed are free from arrest."

Scrutton, Lord Justice, in dismissing the appeal takes occasion, however, to criticise with severity the effect of the rule by which he deems the court bound:

"I quite appreciate the difficulty and doubt which Hill, *J.* felt in this case, because no one can shut his eyes, now that the fashion of nationalization is in the air, to the fact that many states are trading, or are about to trade, with ships belonging to themselves; and if these national ships wander about without liabilities, many trading affairs will become difficult; but it seems to me the remedy is not in these Courts. The Parlement Belge (1) excludes remedies in these Courts. But there are practical commercial remedies. If ships of the state find themselves left on the mud because no one will salve them when the State refuses any legal remedy for salvage, their owners will be apt to change their views. If the owners of cargoes on national ships find that the

ship runs away and leaves them to bear all the expenses of salvage, as has been done in this case, there may be found a difficulty in getting cargoes for national ships. These are matters to be dealt with by negotiations between Governments, and not by Governments exercising their power to interfere with the property of other states contrary to the principles of international courtesy which govern the relations between independent and sovereign states. While appreciating the difficulties which Hill, *J.* has felt, I think it is clear that we must, in this Court, stand by the decision already given, and the appeal must be dismissed."

In the *Queen* v. *McLeod*, 8 Can. Sup. Ct. 1 (1882), it was held that the plaintiff, a passenger on a railway train operated by the Canadian Government, could not have a petition of right. The decision was by a three to two vote. Judge Fournier, in the dissent, contending that since the action was brought on contract, its maintenance was a matter of right. It will be observed, therefore, that so far as suits against the sovereign in England and its colonies are concerned the harshness of the rule of immunity practically disappears, because of the fact that the sovereign habitually consents to suit. Caution should be exercised, lest in applying the analogy of cases against the national sovereign the court fails to note that when a rule of immunity is declared the territorial sovereign is powerless to foretell whether the foreign nation will or will not deal fairly with claimants.

While it thus appears that English law has taken an extreme position in granting immunity

to a foreign sovereign it must be observed that such a sovereign is subject to the jurisdiction so far as real property is concerned and may be made party to a suit where the court is asked to determine the right to a fund and probably property employed by an ambassador in private trade or held by a sovereign in his private capacity has no immunity. The criticism of distinguished judges applying a rule is very commonly the signal for an impending amelioration of its hardship either by statute, judicial decision or treaty provision, and should give pause to the Supreme Court of the United States, in which court the question is entirely open, before it departs from the views uniformly expressed by the judges of that court during more than one hundred years of its existence.

The American Law.

At a very early date the Supreme Court of the United States was confronted with the necessity of rendering a decision as to its jurisdiction where a foreign sovereign was involved, In 1794, in the case of the Sloop *Betsey, supra,* the court held that the District Court could decree restitution of a sloop, captured as prize by a French privateer. That such a decision may not be respected when the property, affected shall thereafter pass without the territorial jurisdiction or that it may involve the political relations of the government with the foreign power was deemed no ground for refusing to take jurisdiction. Such risks are involved in many cases where there is conflict either of private or pub-

lic international law, but such possibility is no ground for taking over a doctrine of ex-territoriality or for refusing to exercise jurisdiction over persons or property within the territory of the court where such jurisdiction ought to be exercised. This rule in prize cases has been followed as recently as *The Appam, supra.* In 1812 the most important case on the subject of immunity of a foreign sovereign was decided, that of the *Schooner Exchange* v. *McFaddon, supra.* It was held that this was a public armed vessel of France and was immune from process. Chief Justice Marshall is careful to assert, with great clarity and force, that there is no limitation on the territorial jurisdiction except as the sovereign of the territory voluntarily consents thereto. Justice Marshall is careful to point out that no opinion is indicated so far as the private property of a sovereign is concerned and that the decision relates to any portion of the armed force which upholds his crown. He says:

> "To the court it appears, that where, without treaty, the ports of a nation are open to the private and public ships of a friendly power, whose subjects have also liberty without special license, to enter the country for business or amusement, a clear distinction is to be drawn between the rights accorded to private individuals or private trading vessels, and those accorded to public armed ships which constitute a part of the military force of the nation.
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> The preceding reasoning has maintained the propositions that all exemptions from territorial jurisdiction must be derived from the consent of the sovereign of the territory;

that this consent may be implied or expressed; and that, when implied its extent must be regulated by the nature of the case, and the views under which the parties requiring and conceding it must be supposed to act."

Bynkershoek, a jurist of great reputation, has indeed maintained that the property of a foreign sovereign is not distinguishable by any legal exemption from the property of an ordinary individual, and has quoted several cases in which courts have exercised jurisdiction over causes in which a foreign sovereign was made a party defendant.

Without indicating any opinion on this question, it may safely be affirmed, that there is a manifest distinction between the private property of the person who happens to be a prince, and that military force which supports the sovereign power, and maintains the dignity and the independence of a nation. A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction; he may be considered as so far laying down the prince, and assuming the character of a private individual; but this he cannot be presumed to do with respect to any portion of that armed force which upholds his crown, and the nation he is entrusted to govern."

The Exchange is the earliest case dealing with sovereign immunity, except for a very brief decision of *Moitez* v. *South Carolina* Federal Cas. 9697 (Admiralty Court, Pa., 1781) in which, on a plea to the jurisdiction, it was adjudged by Hopkinson, *J.*, that mariners enlisting on board a ship of war or vessel belonging to a sovereign independent state cannot libel against a ship for wages due.

In the *Santissima Trinidad,* 7 Wheaton 283 (1822), it was held that the exemption of a foreign public vessel does not extend to her prizes or captured goods landed here. Mr. Justice Story says:

> "In the case of *The Exchange,* 7 C. 116, the grounds of the exemption of public ships were fully discussed and expounded. It was there shown, that it was not founded upon any notion that a foreign sovereign had an absolute right in virtue of his sovereignty to an exemption of his property from the local jurisdiction of another sovereign when it came within his territory; for that would be to give him sovereign power beyond the limits of his own empire. But it stands upon principles of public comity and convenience, and arises from the presumed consent or license of nations, that foreign public ships coming into their ports, and demeaning themselves according to law and in a friendly manner, shall be exempt from the local jurisdiction. But as such consent and license is implied only from the general usage of nations, it may be withdrawn upon notice at any time, without just offence, and if afterwards such public ships come into our ports, they are amenable to our laws in the same manner as other vessels. To be sure a foreign sovereign cannot be compelled to appear in our courts, or be made liable to their judgment so long as he remains in his own dominions, for the sovereignty of each is bounded by territorial limits. If, however, he comes personally without our limits, although he generally enjoy a personal immunity, he may become liable to judicial process in the same way, and under the same circumstances, as the public ships of the nation. But there is nothing in the law of na-

tions which forbids a foreign sovereign, either on account of the dignity of his station or the nature of his prerogative, from voluntarily becoming a party to a suit in the tribunals of another country, or from asserting there any personal, or proprietary or sovereign rights which may be properly recognized and enforced by such tribunals. It is a mere matter of his own good will and pleasure; and if he happens to hold a private domain within another territory, it may be that he cannot obtain full redress for any injury to it, except through the instrumentality of its courts of justice. It may therefore be justly laid down as a general proposition, that all persons and property within the territorial jurisdiction of a sovereign are amenable to the jurisdiction to himself or his courts; and that the exceptions to this rule are such only as by common usage and public policy have been allowed, in order to preserve the peace and harmony of nations, and to regulate their intercourse in a manner best suited to their dignity and rights. It would, indeed, be strange if a license implied by law from the general practice of nations, for the purposes of peace, should be construed as a license to do wrong to the nation itself, and justify, the breach of all those obligations which good faith and frendship, by the same implication, impose upon those who seek an assylum in our ports. We are of opinion that the objection cannot be sustained; and that whatever may be the exemption of the public ship herself, and of her armament and munitions of war, the prize property which she brings into our ports is liable to the jurisdiction of our courts, for the purpose of examination and inquiry, and if a proper case be made out for restitution to those whose possession has been devested by a violation of our neutrality; and if the goods are

> landed from the public ship in our ports, by the express permission of our own government, that does not vary the case, since it involves no pledge that, if illegally captured, they shall be exempted from the ordinary operation of our laws."

In the *Bank of the United States* v. *The Planters' Bank of Georgia*, 9 Wheaton 904 (1824) it was held that the fact that the state is one of the stockholders in a banking corporation does not prevent the corporation from being sued in the courts of the United States. In the opinion, Chief Justice Marshall made a statement frequently quoted:

> 'It is, we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted. Thus, many States of this Union who have an interest in banks, are not suable even in their own courts; yet, they never exempt the corporation from being sued. The State of Georgia, by giving to the bank the capacity to sue and be sued, voluntarily strips itself of its sovereign character, so far as respects the transactions of the bank, and waives all the privileges of that character."

Although the Mexican National Railways (Government Administration) is not a private

corporation, it is submitted that the merely incidental circumstance as to whether a foreign government elects to operate a great railway system through the instrumentality of a corporation rather than by a body in the nature of an administrative bureau or department, should not determine the question of immunity. This should depend upon the essential nature of the business transacted.

In 1838 Mr. Justice Story, in *United States* v. *Wilder*, 3 Sum. 308 held that clothing belonging to the United States, shipped on board a vessel which went ashore was subject to general average. This case is usually cited as based upon the distinction between the English and American law, that there is no immunity, unless the property affected be in the possession of the sovereign. It will be noted, however, that Mr. Justice Story expresses approval of the principle that there should be no exemption of property engaged in common business of commerce. He says:

> "In respect to salvage services to a public ship of war of a foreign sovereign, no decision adverse to the right of salvage has been made, although the question was directly before the Court in the case of *The Prins Frederik*, (2 Dods. R., 451), and underwent a very learned discussion. That case never came to a final decision, the foreign sovereign having submitted to pay such compensation as Sir William Scott should award, and he accordingly awarded to the salvors 800 l. A distinction was taken in that case, which, indeed, has been often taken by writers on public law, as to the exemption of certain things from all

> private claims; as, for example, things devoted to sacred, religious and public purposes; things extra *commercium et quorum non est sommercium.* That distinction might well apply to property like public ships of war, held by the sovereign *jure coronae,* and not be applicable to the common property of the sovereign of a commercial character, or engaged in the common business of commerce."

"In *Tucker* v. *Alexandroff*, 183 U. S. 424 (1902) it was held, the court dividing five to four, that a conscript in the Russian Naval service, sent to become a part of the crew of a Russian cruiser, then under construction at Philadelphia, could be treated as a deserter from a Russian ship of war. In both the prevailing and dissenting opinions the question of immunity is touched upon. Mr. Justice Brown, speaking for the court, says, of a possible claim for immunity of the ship, if libeled.

> "In making this defense it would necessarily appear that she was a public vessel; in other words, a ship of war, and upon that ground immune from suit or prosecution in the local courts."

Mr. Justice Brown approves, however, of the decision of the Parlement Belge, deeming the principle that the property as well as the person of the sovereign is exempt from suit as too well settled to admit of doubt.

Mr. Justice Gray, with whom Chief Justice Fuller and Harlan and White concurred makes a somewhat extended examination of the limits of immunity, and in stating that there is no prece-

dent for extending the exemption to an uncompleted ship apparently rejects the test of ownership and inclines toward that of public use, rather than possession. He says:

> "We find no precedent, either in our own decisions, or in the books of international law, for extending the exemption to an uncompleted ship, or to sailors who have never been on board of her, although intended to become part of her when she shall have been completed."

In two decisions the Supreme Court has denied prohibition on the ground that the question of the immunity of a government-owned or requisitioned vessel engaged in trade is debatable. *Ex-Parte Muir,* 254 United States 522 (1921) was a case of a vessel requisitioned by the British.

Ex Parte Hussein Lutfi Bey, 256 United States 616 (1921) was a case of a denial of prohibition and mandamus where the vessel libeled belonged to the Turkish Government by which the officers and crew were employed and was engaged in commercial trade. The case also involved the question of whether there is any immunity where diplomatic relations have been severed. Judge Van Devanter says:

> "The questions involved are, first, whether the ship of a foreign government which it uses and operates as a merchant vessel is, when within the waters of the United States, immune from process in suits such as have been described, and secondly, whether such immunity can be claimed in respect of the ship of a government which has severed and not resumed diplomatic relations with the United States. Both questions are im-

portant and also new. Their proper solution is not plain, but debatable."

The cases in which the courts deal with suits against the United States or subordinate governmental units rest upon a very different principle, but are serviceable by way of analogy, at least as indicating the extreme limit of foreign immunity.

The Davis, 10 Wall. 15 (1869) held that personal property of the United States on board a vessel for transportation is liable to a lien for salvage. The court holds that actual possession by officers or agents of the United States is necessary to give immunity.

In the *Fidelity,* 16 Blatch. 569 (S. N. Y. 1879), it was held that a steam-tug, used exclusively by an executive department of a municipal corporation was not liable to seizure *in rem.* Waite, *C. J.* points out that mere ownership does not render property exempt, but that it must be devoted to the public use. He says:

"In the case of *The Davis,* the property was cotton shipped by the treasury agent of the United States, from Savannah, to the cotton agent in New York, and does not appear to have been in any manner devoted to the public use or connected with the operation of the Government. In fact, it appears to have been property collected under the abandoned and captured property Act, and shipped to New York for sale, so that the proceeds might go into the Treasury, in accordance with the requirement of that Act. *The Siren* was a case of prize, and the question was, whether damages caused by a collision, for which she was in fault, while on her way into port for adjudication, should

be paid out of the proceeds of her sale on condemnation. No question of public use was involved. There was nothing to take it out of the general rules of maritime law, except its public ownership, and that, all will concede, is not enough. Property does not necessarily become a part of the sovereignty because it is owned by the sovereign. To make it so, it must be devoted to the public use, and must be employed in carrying on the operations of the Government."

The late decision in the *Supreme Court, Ex Parte State of New York,* No. 2 256 U. S. 503 (1921) is to the same effect. Pitney *J.* says:

"By the law of nations, a vessel of war owned by a friendly power and employed in its service will not be subjected to admiralty process; and this upon general grounds of comity and policy. *Schooner Exchange* v. *McFaddon,* 7 Cranch, 116, 144-147. In a case before Judge Francis Hopkinson in the admiralty court of Pennsylvania in 1781, on a plea in the jurisdiction, it was adjudged that marines enlisting on board a ship of war or vessel belonging to a sovereign independent state could not libel the ship for their wages. *Moitez* v. *The South Carolina,* Bee, 422; Fed. Cas. No. 9,697. The question whether by international law the rule of the *Exchange* is to be applied to other kinds of public vessels owned or controlled by friendly powers (see The Parlement Belge (1880), L. R. 5 Prob. Div. 197), was stirred in *Ex Parte, Muir, supra,* but found unnecessary to be decided. It does not now press for solution; for, aside from the obligations of international law, though upon principles somewhat akin it is uniformly held in this country that even in the case of municipal corporations, which are not

endowed with prerogatives of sovereignty to the same extent as the States by which they are created, yet because they exercise the powers of government for local purposes, their property and revenue necessary for the exercise of those powers are to be considered as part of the machinery of government exempt from seizure and sale under process against the city."

If this court has constitutional authority to extend the immunities heretofore allowed to foreign sovereigns, it would seem that a more rational test than ownership, coupled with possession, would be to apply the distinction with which the court is already thoroughly familiar in the law of municipal corporations, allowing immunity as to acts done in a governmental or political capacity and as to property in actual use for such purposes, and denying immunity where the alleged obligations arose out of acts done in a proprietary or *quasi* private capacity and permitting process in *rem* or *quasi in rem* against property those employed.

In *South Carolina* v. *United States,* 199 U. S. 437 (1905), this distinction was applied on a claim to exemption from a federal tax. The State of South Carolina had established dispensaries for the sale of liquor. It was held that such state agencies were not exempt from the internal revenue tax imposed by the Government.

Mr. Justice Brewer, after pointing out that there is a growing movement in favor of the acquisition and management by the public of public utilities, including the entire railroad system and the insistence of some, that the state should

become the manager of all business, and stating the effect which exemption from federal taxation would have in such a case, cites the cases, bringing out the distinction between the duties of a public character, cast upon municipal corporations and those which relate to what may be considered their private business, as affecting liability for negligence, then says:

> "Now, if it be well established, as these authorities say, that there is a clear distinction as respects responsibility for negligence between the powers granted to a corporation for governmental purposes and those in aid of private business, a like distinction may be recognized when we are asked to limit the full power of imposing excises granted to the National Government by an implied inability to impede or embarrass a State in the discharge of its functions. It is reasonable to hold that while the former may do nothing by taxation in any form to prevent the full discharge by the latter of its governmental functions, yet whenever a State engages in a business which is of a private nature that business is not withdrawn from the taxing power of the Nation."

Similarly, in *Los Angeles* v. *Los Angeles Gas Corporation*, 251 U. S. 32 (1919), it was held that a municipal corporation, establishing a lighting system of its own, could not remove without compensation the fixtures of an existing company.

Mr. Justice McKenna says:

> "The court reasoned and concluded that what the city did was done not in its governmental capacity—an exertion of the police

> power, but in its "proprietary or *quasi* private capacity" and that therefore the city was subordinate in right to the corporation, the latter being an earlier and lawful occupant of the field. The difference in the capacities is recognized, and the difference in the attendant powers pointed out in decisions of the court."

This resumé of the decisions in the Supreme Court of the United States make it perfectly clear that the immunity granted in this case goes far beyond any case heretofore decided by the court. Millions of tons of shipping engaged in trade are government-owned. There is a growing tendency toward the nationalization of transportation, public utilities and to some extent of commerce and industry, particularly in productions of a basic character or of which particular nations have a monopoly. Can it be possible that by the mere election of a foreign government to carry on such business directly, and not through the medium of a private corporation, business organizations will be given the enviable privileged position of transacting business in our midst, free from the obligation of our laws. This is a reversal of any national policy of protection. Not only are the foreign concerns able to compete on terms of equality, but they may transact business, enter into contracts for service or purchase, have millions of dollars on deposit in our banks, enjoy full protection, be able to resort freely to our courts, and be under no reciprocal obligation. Freedom from liability for negligence, except by resort to foreign courts in a distant forum or to uncertain diplomatic relief, creates a tremendous dif-

ferential in favor of the foreign organization, which in view of the intensity and closeness of modern competition may frequently be fatal.

The experience of claimants against the government of Mexico may illustrate how much more satisfactory is protection in courts of law.

In 1 Rives "The United States of Mexico" 4 commenting on the message of President Jackson in December, 1835, in which reference was made to governments affected by domestic dissensions, upon which our citizens have valid and accumulated claims, says:

> "'Revolution,' said the President, 'succeeds revolution, injuries are committed upon foreigners engaged in lawful pursuits, much time elapses before a government sufficiently stable is erected to justify expectation of redress—ministers are sent and received, and before the discussions of past injuries are fairly begun, fresh troubles arise, but too frequently new injuries are added to the old to be discussed, together with the existing government, after it has proved its ability, to sustain the assaults made upon it, or with its successors if overthrown.'"

Ibanez in "Mexico in Revolution" page 2 draws attention to the instability of Mexican governments, saying:

> "In less than one hundred years—beginning with 1821—the Republic of Mexico has been served by seventy-two different governments. Now with the fall of the Carranza regime the record stands at 73, with time to spare before the century closes. Leaving aside the thirty years of Porfirio Diaz's rule we find that the average life of each government has been approximately one year."

The possession and use of property in the transaction of business should always subject it to the obligations created by the law of the jurisdiction. Our law has always looked with disfavor upon the attempts to withdraw property from the stream in which the interests of all are merged. This accounts for the statutes of mortmain, for the illegality of conditions in restraint of alienation, and for the restrictions placed upon spendthrift trusts. Will this court now create for foreign-owned business comfortable oases where there is no law of contract and no liability for wrong doing?

The question of the immunity of a government engaged in trade has come before the federal judges in an increasing number of cases, particularly as regards ships employed in commerce. The decision which we deem of the greatest importance for consideration of this court is that of *The Pesaro*, 277 Fed. 473 (D. S. N. Y. 1921) The opinion of Judge Mack in denying immunity to a steamship, owned and operated by the Italian Government, as an ordinary merchant vessel is an elaborate, searching examination of the entire question, covering not only all of the leading English and American authorities, but also in the supplemental opinion the law of the chief countries of Europe. Judge Mack points out that the *Pesaro* would not be immune in the courts of Italy, and it is difficult to see why our tribunals should decline jurisdiction. The steamship owned by the Kingdom of Italy was registered in the name of the ministry for railway and maritime transportation, a department of the royal Italian Government,

charged with the affairs of maritime and railway transportation, having at its head, a member of the Italian cabinet, and was manned by a master and crew, employed by and under direction of such ministry. The case, therefore, presents a situation as to operation closely parallel to the National Railways of Mexico (Government Administration.) The statement of the Secretary of State, of the United States, which appears at page 479 of the report in which it is stated that it is the view of the department that government-owned merchant vessels should not be immune seems of great significance, showing that there is no political or diplomatic necessity for insisting that government trading should not be carried on under the ordinary conditions of liability for tort or breach of contract. The statement is as follows:

> "It is the view of the Department that government-owned merchant vessels or vessels under requistion of governments whose flag they fly employed in commerce should not be regarded as entitled to the immunities accorded public vessels of war. The Department has not claimed immunity for American vessels of this character. In cases of private litigation in American ports involving merchant vessels owned by foreign governments, the Department has made it a practice carefully to refrain from taking any action which might constitute an interference by the authorities of this govenrment in such litigation."

A like conclusion was reached in the case of *Campbell and Stuart, Incorporated* v. *The Gul*

Djemal, an unreported decision of Judge Knox, (Jan. 7, 1922) which has recently been argued before this court, No. 83, October Term. This case was put both upon the ground that the *Gul Djemal*, which was owned by the Turkish Government, was engaged in trade, and also that there had been a severence of diplomatic relations. So far as the question of trade is concerned Judge Knox, after quoting from the opinion of *The Pesaro*, says:

> "I will, however, observe that, in my judgment a government which makes it possible, as here, for an individual, who is hedged about with no special immunities or prerogatives, to use sovereign property for purposes of trade and commerce, and in competition with that of private owners, has brought itself squarely within the declaration of the *Supreme Court in Bank of U. S.* v. *Planters' Bank of Georgia*, 9 Wheaton, 904, where it was said, 'It is, we think, a sound principle that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character and takes that of a private citizen. Instead of communicating to the company its privileges and prerogatives, it descends to a level with those with whom it associates and to the business which is to be transacted.' The existing immunities and prerogatives of governments are all but too extensive, and the one here claimed should not be permitted to destroy, as it would, the basic principle that in trade and commerce there should be for the persons engaged therein a fair field and no favors."
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> * * * *

The position that there is immunity in such cases has been taken in: *The Pampa* 245 Fed. 137 (D. E. N. Y. 1917); *The Maipo*, 252 Fed. 627 (D. S. N. Y. 1918); *The Maipo*, 259 Fed. 367 (D. S. N. Y. 1919); and *The Carlo Poma*, 259 Fed. 369 (C. C. A. 2nd 1919).

In the first decision in the *Maipo* case the influence of war conditions is noticeable. Judge Mayer says:

> "Indeed, it would not be surprising if at no distant date large numbers of vessels setting out from various ports of various countries would be manned as government vessels for the very purpose of assuring quick clearance and freedom from process. Whatever loss or inconvenience, if not safeguarded against, might thus result either to our people when dealing with foreign ships or to foreign peoples when dealing with us, is the price which the individual is paying for the ultimate benefit of his country.
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> It is not to be presumed, however, that any friendly government, or our own government, will fail to do what is just and fair in connection with operations of a commercial character."

In the second decision of the *Maipo*, Judge Hough, evidently sharing the feeling of Justice Hill and Lord Justice Scrutton, says:

> "Now, it may be the opinion of counsel, as it assuredly is my opinion, that when a sovereign republic, empire or whatnot, goes

into business and engages in the carrying trade, it ought to be subject to the liabilities of carriers just as much as any private person; but I think it must be plain that if I, in my official capacity, were to assert that view and enforce it, I would be assuming (in this case), as one of the humbler officers of the government of the United States, to define for the Republic of Chile that what that republic should consider to be a governmental function.

If the republic of Chile considers it a governmental function to go into the carrying trade, as would appear to be the case here, that is the business of the Republic of Chile; and if we do not approve of it, if we do not like it, if we do not wish any longer to accord that respect to the property so engaged, which has hitherto been accorded to government property, then we must say so through diplomatic channels, and not through the judiciary. Otherwise, the judiciary are really contributing to what might become, under conceivable circumstances, a *casus belli*.

Therefore, I feel, not only because there is no distinction between this case and the previous decision in the *Maipo* case, but for the greater reason that the question is not justiciable, but diplomatic, that the motion must be granted, however hard it may be upon private persons; and I do think it is very hard."

The *Carlo Poma* decision was reversed in 255 U. S. 219 (1921) for the reason that appeal should have been direct to the Supreme Court.

In *Long* v. *The Tampico*, 16 Fed. 491 (D. S. N. Y., 1883), it was held that two steam cutters, constructed for an agent of the Mexican Government, and by him turned over to masters to be taken to Vera Cruz, were not to be deemed in the public service and therefore not immune.

The *Florence H.* 248 Fed. 1012 (D. S. N. Y. 1918) was a libel in rem for collision on the high seas against the *Folrence H.* The *Florence H.* had been requisitioned by the United States, and delivered by the Fleet corporation to the United States Shipping Board and registered in the name of the United States Shipping Board. Thereafter the Board chartered the ship to the French Government for one round trip voyage from the United States to France. After carrying a cargo of food for the French Government, while returning in ballast and still in the possession and control of her French crew a collision occurred with the British steamer *Mirlo.* It was held that the vessel had no immunity. Learned Hand, *J.* says:

> "*The Exchange*, 7 Cranch, 117, 3 L. Ed. 287, was, it is true, the case of a ship of war, and the decision can hardly be thought to go further; yet it is significant that Lord Esher, in the Parlement Belge, *supra*, used it as a basis for his conclusion that a ship used for any "national public purpose" is within the immunity of the sovereign. In so far as the *Charkieh*, L. R. 4 Ad. & Ec. 59 has anything to the contrary, it must be thought overruled. Assuming the *Florence H.* to have been so immune while in the possession of the United States, yet in salvage cases it is certainly established that, where property of the sovereign is in the posses-

sion of an individual other than an officer of the sovereign, whose custody is only official, it is not exempt from process. The *Davis*, 10 Wall. 15, 19 L. Ed. 875; *The Tampico* (D. C., 16 Fed. 491, 501; the *Johnson Lighterage* cases (D. C.) 231 Fed. 365. Indeed, in certain cases the rule has been pressed further than this. *U. S.* v. *Judge Peters*, 5 Cranch, 115, 3 L. Ed. 53; *U. S.* v. *Lee*, 106 U. S. 196, 1 Sup. Ct. 240, 27 L. Ed. 171. In each of these cases it is difficult to see that the possession of the defendant was other than mere official custody, and yet process went (and that, too, in suits not in salvage) against the sovereign's property. Nor does it seem to me that the character of the suit can in any sense determine the question here at bar, which is only whether the sovereign's property may be subjected *in invitum* to the results of a contentious proceeding. It can make no difference whether the question is an implied contract arising from the salvage of the property or the existence of a lien from its tortious management. The question is whether the sovereign can be subjected to the necessity of defending his property from private claims to whose propriety he does not assent."

The court holds that section 9 of the shipping law removes any question, provided the vessels are employed solely as merchant vessels. The court holds that it makes no difference that the ship was in the possession of the French Republic, and in charge of a French crew. Judge Hand says:

"None of these considerations is, however, in the least applicable to the conduct of the agents of a foreign power on the high

seas and under the national flag of the sovereign to which the court owes allegiance. By no hypothesis may the conduct of the French crew be determined under the law of the French Republic, which had no sovereignty over the *locus in quo*. Whether the acts of its agents were wrongful or not must depend either upon the law of the United States or upon the *jus gentium*, if there be any such. There can be no embarrassment juristically in undertaking a judgment upon them."

In the *Johnson Lighterage Company*, 231 Fed. 365 (D. N. J. 1916), in a suit for salvage against a scow and its cargo, it was held that the cargo belonged to the Russian Government, and could not be released since possession was in the Lighterage Company. Haight *J.*, says:

"In the absence of treaty provisions I know of no principle which, in a case as this would afford a foreign government greater immunity from judicial process than that which is enjoyed by our own government. The immunity granted to friendly foreign governments rests upon international comity (*The Exchange, supra; The Santissima Trinidad*, 7 Wheaton 253, 352; 5 L. Ed. 454) but the underlying principle upon which the immunity is granted is nevertheless, the same in both cases namely that the exercise of jurisdiction is inconsistent with the independence of sovereign authority and public policy. See the *Siren, supra; Stanley* v. *Schwalby, the Parlement Belge*, 5 Prob. Div. 197; *Long* v. *Tampico, supra.*

I therefore conclude that the property in question although it belonged to the Russian Government and was destined to its public use was subject to a lien for salvage services, rendered in saving it, and that as

it was not at that time or at the time of its seizure by the marshal in the actual possession of an officer of the Russian Government, the lien may be enforced in this court by a proceeding *in rem*."

Opposite conclusions have been reached in seas against the *Florence H.* The *Florence H.* cases of requisitioned vessels. In the *Attualita*, 238 Fed. 909 (C. C. A. 4th 1916) it was held that a merchant vessel requisitioned by a foreign government, but under the control of the owner, is not exempt from a suit *in rem*. The *Per Curiam* opinion states:

> "It is asserted that the steamship is immune to proceedings in any court. It is admitted that to give this immunity it will be necessary to take a step beyond that which has been taken in any decided case, although it is argued that the logic of some decisions heretofore made require that step. We are frankly reluctant to take it. There are many reasons which suggest the inexpediency and the impolicy of making a class of vessels for which no one is in any way responsible."
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> "The immunity granted to diplomatic representatives of a sovereignty, to its vessels of war, and under some circumstances to other property in its possession and control, can be safely accorded, because the limited members and the ordinarily responsible character of the diplomats or agents in charge of the property in question and the dignity and honor of the sovereignty in whose services they are, make abuse of such immunity rare. There will be no such guaranty for the conduct of the thousands of persons privately employed upon ships which at the time happen by contract or requistion to be under charter to sovereign governments."

The opposite conclusion was reached in the *Roseric*, 254 Fed. 154 (D. N. J. 1918). Judge Rellstab criticised the *Attualita* case on the ground that it unduly subordinates rights of sovereignty to those of the individual. After stating that immunity is based upon the idea that sovereigns are of equal dignity, and that to further amicable relations one sovereign declines to exercise certain of its prerogatives, Judge Rellstab says:

> "If these ideas dominate the question whether immunity should be granted to a foreign sovereign's property devoted to the public service, it logically follows that it is not the ownership or exclusive possession of the instrumentality by the sovereign, but it is appropriation and devotion to such service, that exempts it from judicial process. That in such use the owner of the instrumentality, through its servants, is permitted to remain in physical possession thereof, and, in consequence, may become personally liable for its agent's torts, is of no moment, where, as in this case, the ship and its entire equipment is under the absolute dominion of the sovereign."

An interesting effect of immunity in making a substitution of cargo space on a Brazilian transport improper is seen in the case of *Moore & McCormack Co.* v. *Hesslein*, 255 Fed. 46 (C. C. A. 2nd 1918) in which Judge Ward says:

> "Shipment, if made, would have been in possession of the Brazilian Government and if it had been damaged or lost the respondents could not have proceeded against the Brazilian Government, it being a sovereign, *in personam* or against its steamer *in rem*."

In the case of the Gloria, 286 Fed. 188 (D. S. N. Y. 1923) it was held that a right of counterclaim exists against the United States or a foreign state, at least to the extent of determining the amount due. In this case Judge Mack quotes from *The Terraete* L. R. (1921) Prob. 197 to the effect that a sovereign may be guilty of a wrong.

In the *Kingdom of Roumania* v. *Guaranty Trust Company*, 250 Fed. 341 (C. C. A. 2nd 1918), reversing the decision of Judge Manton, 244 Fed. 195, it was held that the bringing of an action by a foreign nation to recover a deposit in a bank is not a waiver of its immunity as a sovereign from suit by other parties, and the court is without jurisdiction to permit the defendant by interpleader to substitute another party claiming a lien on the deposit as a creditor of the plaintiff, but who alleges no facts which would make such deposit a trust fund. Ward *C. J.*, says:

> "These authorities arose on a quite different state of facts. In the present case there is no specific fund. The relation between the Kingdom of Roumania and the Guaranty Trust Company being the usual one of debtor and creditor existing between banks and depositors, we are clear that the action by the Kingdom of Roumania to recover a debt owed it by the Guaranty Trust Company was not a waiver of its immunity as a sovereign to be sued by other parties. If this be not so, the immunity can be frittered away either by interpleader or attachment in any case where a foreign sovereign undertakes to collect a debt owed it.
>
> There is an additional intimation in the opinion of the District Judge that the King-

dom of Roumania had been engaged in business in this country and had thereby taken on the character of a private individual, *Bank of the United States* v. *Planters' Bank of Georgia*, 9 Wheat. 904, 906, 6 L. Ed. 244; *South Carolina* v. *United States*, 199 U. S. 437, 463, 26 Sup. Ct. 110, 50 L. Ed. 261, 4 Ann. Cas. 737. It seems to us manifest that the Kingdom of Roumania in contracting for shoes and other equipment for its armies was not engaged in business, but was exercising the highest sovereign function of protecting itself against its enemies."

In *Hewitt* v. *Speyer*, 250 Fed. 367 (C. C. A. 2nd 1918) it was held that a suit in equity could not be maintained by a bondholder, claiming an equitable lien on customs revenues received by Speyer and Company from Ecuador on the ground that persons involved with a government in the performance of acts in its sovereign capacity cannot be subjected to a civil liability therefor. This case does not rest upon the ground of immunity, but on the conclusive validity of the foreign acts. Where the immunity of the territorial sovereign is concerned third persons and agents can be held.

U. S. v. *Lee*, 106 U. S. 196 (1882);
Stanley v. *Schwalby*, 147 U. S. 508 (1893).

This review of the decisions of the lower federal courts shows that they are in conflict as to the immunity of government-owned or requisitioned vessels engaged in trade, and that it has never been held that a foreign sovereign having a permanent office for the transaction of business within the jurisdiction of the court possesses im-

munity. Certain of the judges while following what they conceive to be the rule of immunity, point out its hardship. The state of the decisions shows that it is important for this court to decide the question.

There have not been a large number of decisions in the state courts dealing with immunity.

In *Wilcox* v. *Luco*, 118 Cal. 639 (1897) Harrison, *J.*, says:

> The immunity of ambassadors and public ministers from suits in the courts of the country to which they are sent is not extended by any principles of International Law to consuls."

In *Briggs* v. *Light Ships*, 93 Mass. 157 (1865) Judge Gray discusses the principle and holds light ships in the possession of the United States Government immune.

In *Mason* v. *Intercolonial Railway*, 197 Mass. 349 (1908) it was held that the funds of a government-owned Canadian Railway were immune in an action for an injury to a passenger in Canada alleged to have been caused by negligence. While there is nothing to indicate that the railway in question was regularly transacting business within the state of Massachusetts the language of the opinion is broad enough to indicate that their might be immunity even though the tort had been committed within the State of Massachusetts. It is submitted that if the Intercolonial case stands for any such extreme doctrine of immunity it should not be followed by this court.

In New York it was held in *Hassard* v. *Mexico*, 29 Misc. 511 (1899); affirmed 173 N. Y. 645 (1903)

that property of a foreign government could not be attached in an action *in personam*.

Wulfsohn v. *Russian Socialist Federated Soviet Republic*, 234 N. Y. 372 (1923) held that the unrecognized government of Russia could not be sued for seizure of furs in Russia alleged to have been confiscated by the Russian Government. This case is now upon the calendar of the Supreme Court of the United States.

Judge Andrews, who wrote the opinion also wrote the opinion in the *Russian Socialist Federated Soviet Republic* v. *Cibrario*, 235 N. Y. 255 (1923), holding that an unrecognized government may not sue. He explains the *Wulfsohn* case as follows:

> "Nor is anything here decided inconsistent with *Wulfsohn* v. *Soviet Republic, supra*. Upon the facts in that case, if the defendant was not an existing government it might not be sued. There was no party before the court. If it were, as was alleged and admitted, the same result followed not because of comity, but because an independent government is not answerable for its acts to our courts."

In *Molina* v. *Comision*, 91 N. J. L. 382 (1918), in which a motion to dissolve an attachment was denied in an action against a corporation created by the State of Yucatan, to assist in carrying out its policies with reference to the growth and sale of sisal hemp, Judge Swayze holds that immunity does not extend to a foreign corporation, although it is a governmental agency of a political sub-division of a foreign government. He points out very persuasively the disastrous effect upon domestic trading corporations of giving the extremely valuable privilege of immunity from judicial proceedings. He says:

"I come then to the question of the immunity of the *Comision Reguladora*. The immunity of an independent foreign sovereign in our courts is well established. The reasons on which it rests are set forth with his usual lucidity by Chief Justice Marshall in *Schooner Exchange* v. *McFaddon*, 7 Cran. 116, 3 L. Ed. 287. To what extent, if at all, this rule of immunity is to be modified by the change of times which leads, not only political subdivisions of foreign governments, but foreign governments themselves, to engage in ordinary commercial transactions abroad is a question I need not now consider, except to call attention to the weighty words of Chief Justice Marshall in *Bank of United States* v. *Planters' Bank of Georgia*, 9 Wheat. 904, 6 L. Ed. 244, which I quote hereafter.

The present suggestion is that this immunity extends to a foreign corporation if it is a governmental agency of a political subdivision of a foreign government, or if a foreign government is indirectly interested in the corporation because its work contributes to the prosperity of the foreign country. The proposition is a startling one. If it is correct, corporations of foreign governments, if they are governmental agencies, may come into New Jersey regardless of any restrictions imposed by our statutes, since we shall be unable to enforce our own laws by judicial proceeding against them, and upon the same principle the United States government will be unable to enforce acts of Congress. Since a foreign government may make any corporation a governmental agency, fiscal, commercial or otherwise, it will rest entirely with foreign governments whether they will clothe their own corporations with the extremely valuable privilege of immunity from judicial pro-

ceedings, a privilege so valuable that domestic corporations of our own creation, compellable to pay their debts by means of judicial process, would have no chance in the race of competition. Our corporations would be actually subject to the restraint of our statutes; foreign corporations would be only nominally subject thereto.

If we are to go further and extend this immunity to foreign corporations, in which foreign governments are indirectly interested because they contribute to the prosperity of the country, as suggested in the letter of the Mexican ambassador, nothing will be left for our own citizens to do except to avail themselves of the same privilege in foreign lands and conduct their affairs abroad where they may hope for at least an equal chance. I think it safe to say that no authority can be found in the books for the proposition that foreign corporations which happen to be governmental agencies are immune from judicial process. None of the reasons given for the immunity of sovereigns are applicable to corporations, whether governmental agencies or not. The importance of preserving the immunity of sovereigns in order to preserve the independence of states, the obligation of a sovereign not to degrade the dignity of his nation by placing himself or its sovereign rights within the jurisdiction of another, the perfect equality and absolute independence of sovereigns, the common interest impelling them to mutual intercourse and an interchange of good offices with each other, are the underlying reasons for the immunity of sovereigns, as stated by Chief Justice Marshall. None of these reasons is applicable to a commercial corporation, even though it may be a governmental agency. As the Chief Justice says:

'When private individuals of one nation spread themselves through another as business or caprice may direct, mingling indiscriminately with the inhabitants of that other, or when merchant vessels enter for the purpose of trade, it would be obviously inconvenient and dangerous to society, and would subject the law to continual infraction, and the government to degradation, if such individuals or merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country'.

The case of *Schooner Exchange* v. *McFaddon* was the case of a public armed vessel claimed by the French Government. Previously to that decision, it had even been a question whether public vessels were immune."

* * * *

The dignity of the government, if it suffers at all, suffers because it voluntarily enters into a commercial enterprise, and its independence is not affected by proceedings against the corporation. The extension of the rule of immunity has been carried far, since in Marshall's day it was a question whether even a public vessel of war was immune from seizure; but it has never been carried so far as to permit a foreign government to detract from the independence and dignity of the nation which was hospitable to its corporations by making them public agencies and thereby attempting to withdraw them from the jurisdiction of their host. The independence and dignity of a state requires that it should be free to exercise jurisdiction quite as much as, in a different case, it should refuse to exercise jurisdiction. The dignity and independence of New Jersey is quite as important as the dignity and independence of Yucatan. Our dignity and independence would suffer if we should be unable to exercise jurisdiction in

> our own borders over a business corporation which is here only by courtesy. That courtesy is extended, or must be assumed to be extended, to the corporation upon terms that it shall be subject to our law."

All that he says as to the power of a foreign government under such circumstances is equally applicable if the foreign government while not creating what is technically known as a corporation under Anglo-Saxon law creates a governmental administration, the competition of which, if armed with immunity from suit, would be equally unfair and discriminatory against domestic trade.

Continental Authorities.

As it is pointed out in Judge Mack's brilliant opinion in the *Pesaro, supra,* there is much difference of opinion among European jurists as to the extent of the immunity to be accorded foreign states.

Walton, *State Immunity in the Laws of England, France, Italy and Belgium, Journal of Comparative Legislation and International Law,* October, 1920 (3rd series, Vol. II, Pt. I, p. 252), says of the *Porto Alexandre* case:

> "The decision is clearly in accord with precedents, but it is none the less contrary to the sense of justice.
>
> Immunity of Foreign Sovereigns.—So is, in my opinion, the rule of the English law that a foreign sovereign is not liable to be sued in an English court in respect of acts done by him in England in his private ca-

pacity. Who, except the defendant, can be satisfied with the decision in *Mighell* v. *Sultan of Johore* (1894, Q. B. 149, 63 L. J. Q. B. 593)?

* * * * *

"Conclusion.—The broad conclusion, then, is that, in deciding the question of competence, everything depends on the nature of the act or the affair which created the liability. If it was a political act, the foreign Court has no jurisdiction. And by a political act we mean an act which, by its nature, could only be performed by a Government. On the other hand, if the act or the affair was one which a private individual might have done or been engaged in, the foreign Court is competent to entertain the suit, and that irrespective of whether or not it has any means to enforce the execution of its judgment. It seems clear, therefore, that the highest Court in Belgium would have answered the question raised in *The Porto Alexandre* in a contrary sense. The situation may be summed up as follows:

The French jurisprudence is against the possibility of making the distinction referred to between sovereign acts and other acts. But the principle case is an old one, and the question there was as to an act which might be considered as of a sovereign character. (Cass. 22 janv. 1849, D. 49. I. 81.)

In the eighty years which have elapsed since its date, there has been a decided change in the practices of States, and a consequent change of opinion on the matter among legal writers. The change of opinion among professional writers has led the Courts in Belgium, Italy and Egypt, to adopt what may be called the new view—that is, that the foreign State as a trader has no immunity; and it is quite likely that the French Courts will abandon their former at-

> titude. Already, in France, in cases against a foreign State arising out of its administration of a State railway, the custom is for the foreign State not to take the plea of incompetence."

The resolutions adopted by the Institute of International Law at its conference at Hamburg in 1891, Annuaive de L'Institut 11, p. 407, as to actions maintainable against a foreign state clearly show the numerous cases where it seems almost obvious that immunity ought not to exist. Among these are:

> "Les actions qui se rapportent a un establissement de commerce ou industriel ou a un chemin de fer exploite par l'Etat etranger dans le territoire."
>
> "Les actions fondees sur des contrats conclus par l'Etat etranger dans le territoire, se l'execution complete dans ce meme territoire ne pent etre demandee d'apres une clause expresse ou d'apres la nature meme de l'action;
>
> "Les actions en dommages-interests nees d'un quasi-delit, qui a en lieu sur le territoire."

The brief of Henry R. Guild, G. Evans Hubbard, William Dexter and Frederick S. Winsten, presented in the Ames Competition in the Harvard Law School, dealing in substance with the question raised in the *Pesaro*, states the modern tendency as follows:

> "The courts of Italy, Belgium, Holland, and Switzerland, and the leading authorities of France, Germany, and Russia, as well as some of the courts in these countries, make a clear distinction between property owned by a government in its sovereign capacity and property which it engages in trade. It is

held that the latter is not clothed with sovereignty and therefore international law is not concerned at all."

The situation in certain of the more important countries of Europe appears to be as follows:

Belgium: The leading case is *Liege & Luxemburg R. R. Co.* v. *The Netherlands,* 1904 Sirey IV 16. This was an action on a contract by the Dutch Government to defray half the cost of erecting a joint railroad station. It is held that a state may do certain acts in the capacity and under the same liabilities as a private corporation.

The opinion by the court is, in part, as follows:

"But the state ought not to confine itself to political activity. Because of the needs of society it may acquire and own property, contract, and become a creditor or a debtor. It may even engage in commerce and reserve to itself monopolies or the direction of public utilities. In performing these services the state does not make use of its political function, but does what any individual may do, and acts only as a private person or citizen. When in this capacity it becomes involved in a controversy concerning a contract which it made after having dealt on equal terms with its co-contractor, or becomes liable for a tort in a matter not connected with its political function, the cause of action has for its object the vindication of a civil right which is within the exclusive cognizance of the courts under the terms of Article 92 of the Constitution. Foreign states, in their capacity as private persons, and on the same grounds as other foreigners, are subject to the jurisdiction of the Belgian courts. For these states, as for the Belgian state, sovereignty is not involved when they

are in court only for the exercise or the defense of a private right and not as a Sovereign Power.

"There is no need to distinguish, as the decision appealed from attempts to do, between a cause of action concerning the execution of a contract made by a foreign state and an action concerning real property within our territory and owned by that state."

* * * * *

"It is impossible to see why a state must abrogate its sovereignty when it submits to the jurisdiction of foreign courts in regard to contracts into which it has freely entered, and yet can preserve this sovereignty intact when it has recourse to our courts or appears generally. Under the latter circumstances the authorities are almost unanimous in admitting the jurisdiction. Besides, could there be any such renunciation of an inalienable prerogative, a renunciation of immunity might be implied in the case of a contract as well as in the other cases mentioned. In fact, in any case, jurisdiction is derived not from the consent of the party, but from the nature of the act and the capacity in which the state has acted."

The court points out that there may be difficulty in executing the judgment, but that such objection is not decisive.

France. When the right of bondholders to attach the property of a foreign state first came before the courts of France in 1845, the action was allowed at Pau, but the decree was cased in 1849 in *Lambiege & Pujol* v. *Spanish Government*, Dalloz I 7, on the ground that the garnishee would not be discharged in Spain.

In *Mellerio* v. *Isabel de Bourbon*, 1872 Sirey II 293, judgment was given against the Queen of Spain on account of jewelry purchased for her private use.

Pradier-Fodere in dealing with Admiralty law says in his *Droit International* (1891) Vol. V at page 336:

> "In the case where the vessel at fault in a collision is a warship of a foreign state which is engaged in commerce and has thus laid aside its sovereign character, it seems to be admitted in many countries, as it has been frequently decided in France, that it should be treated as an ordinary merchantman."

Germany. In *Von Hellfeld* v. *Russian Government*, decided by the Royal Court for the Determination of Jurisdictional Conflicts in 1910. the translation of the opinion appearing in 5 *American Journal of International Law* 490, garnishment of a debtor of the Russian Government was denied a judgment creditor on a judgment recovered in the Kiautschou Consular court on a counter claim. This decision was based on a full acceptance of the doctrine of ex-territoriality. The court says:

> "In the jurisprudence of the great civilized states, no trace is found of any principle denying the ex-territorality of foreign states before their courts; rather is it found that the principle is recognized universally as the jurisprudence cited by Droop and Loening (*loc. cit.*) indicate. Divergent decisions of isolated courts can not shake this general recognition, especially when far-reaching criticism has been directed against such opinions as those cited by the creditor, as from

the courts of Belgium and Italy (Loening, loc. cit., p. 52). A special point of emphasis must be made of agreement with the decisions of the Prussian Court to Determine Jurisdictional Conflicts of January 14, 1882, and of the Imperial Supreme Court of December 12, 1905, that there has never been a recognized distinction in international law between the state as the bearer of its political power and the state as a private person subject to the civil law, and that in both characters the state possesses the right of ex-territoriality. With this statement the contention urged by the creditor (Von Hellfeld) falls to the ground, that although the Russian Empire in the transactions with Von Hellfeld did not act in a private business transaction but in the exercise of its political sovereignty—imperium—yet that between him and Russia a legal relation subsisted to be regarded like a private business relationship and that therefore the right of action at law lies, even though the general ex-territoriality of states be conceded.

The basic principles of international law, concerning the ex-territoriality of states, apply to both exercises of the judicial power, *i. e.*, to the judgment and to its enforcement. The Russian state and such of its property as is found in Prussia are therefore not *per se* subject to the judicial execution of the judgment of September 27, 1909. It is true that by the laws of nations there are exceptions to the exterritoriality of states, in such cases as proceedings affecting real property (Immobiliarprozess) and of a voluntary submission to the foreign jurisdiction."

Holland. In *Ysselsteyn's Heirs* v. *Belgium*, 1903 Weekblad van het Recht No. 7888, the Supreme Court of Holland affirmed a judgment against the Belgian government on account of an overpayment made by a Dutch citizen on a shipment of wood over the Belgian state railway.

Italy. A decision rendered by the court at Lucca in 1887, and reported in 1888 Clunet 289, distinguishes between 'atti d' impero' and 'atti gestione,' holding that the Italian court has no jurisdiction over the first, but has over the second. Numerous later cases have followed this decision.

Russia. Fedor de Martens, a leading Russian jurist, in his *Law of Nations*, at page 317 (German edition, 1883) says:

> "As a sovereign, the foreign prince is exempt from civil jurisdiction; as a private person, he is not: *e. g.* in the event of the claim preferred against him having some connection with the immovable property belonging to him in the foreign country in question or arising from some commercial undertakings on his part."

Switzerland. A recent Swiss case, *Dreyfus* v. *Austrian Ministry of Finance*, 1918, De Lapradelle, Revue, Vol. 15, p. 172, holds that a Swiss dille, Revue de Droit International Prive, Vol. 15, p. 172, holds that a Swiss holder of an Austrian bond payable in Switzerland may garnish a deposit standing in the name of the Austrian Ministry at a Swiss Bank. The bonds in question were issued in Switzerland and provided for payment in Swiss currency. The court says:

> "As regards the securities of this catagory, the whole transaction must take place in Switzerland, and consequently the state can be sued (and subjected to provisional measures such as garnishment) within Swiss jurisdiction as being the 'forum contractus' (cf. von Bar, loc. cit., p. 676), if not the forum expressly consented to."

It is to be noted that in the development of railroads and their ownership by governments,

the question of the treatment of rolling stock in foreign countries became important and that immunity was provided for by the Railroad Freight Convention of Berne, statutes being provided to this effect. But even this privilege is given only on condition of reciprocity and does not prevent a creditor levying on the property of a foreign government railroad, if it should become bankrupt.

Von Bar, International Law (1889) *Gillespie's Trans.*, p. 115.

Text Writers, Treaties and Statutes.

It seems to be commonly assumed that the writers on International Law have laid down a sweeping doctrine to the effect that foreign sovereigns are immune. Such an assumption does not seem to be warranted. *Halleck, International Law*, 235, says that:

> "A sovereign prince is exempt from the jurisdiction of the tribunals of the State in which he happens to be, absolutely so far as his person is concerned, and with respect to his property, at least so far as that is connected with the dignity of his position and the exercise of his public functions."

Hall International Law, 7th, edition, 178 says with reference to the immunity of sovereigns that when States were identified with their sovereigns, considerations of courtesy were naturally prominect, and to them must still be referred such established immunities as are not necessary to the

free exercise of the functions of the exempted person or thing. He adds:

> "A sovereign, while within foreign territory, possesses immunity from all local jurisdiction in so far and for so long as he is there in his capacity of a sovereign. He cannot be proceeded against either in ordinary or extraordinary civil or criminal tribunals, he is exempted from payment of all dues and taxes, he is not subjected to police or other administrative regulations, his house cannot be entered by the authorities of the state, and the members of his suite enjoy the same personal immunity as himself."
>
> * * * *
>
> "Where, as occasionally happens, a sovereign has a double personality, where, that is to say, he for some purposes assumes the position of a private individual, or where, while remaining sovereign in his own country, he is a subject elsewhere, he is amenable to foreign jurisdiction in so far as he is clothed with a private or subject character. Thus if he enters the military service of a foreign country he submits to its sovereignty in his capacity of a military officer, and if he travels incognito he is treated as the private individual whom he appears to be; as however in such cases he is only accidently or temporarily a private person, and as he properly remains the organ of his country, he has the right of taking up his public position whenever the exercise of jurisdiction over him becomes inconsistent in his view with the interests of his state."
>
> * * * *
>
> "When a sovereign holds property in a foreign country, which clearly belongs to

him as a private individual, the court of the state may take cognizance of all questions relating to the property, and the property itself is affected by the result of the proceedings taken in them."

* * * *

A note adds:

"It is considered by many writers that real property held by a sovereign in a foreign country, as a private individual is alone subject to the local jurisdiction, and that personal property is exempt. The distinction appears also to be sometimes made in practice. It is however irrational in itself, and it is difficult to see, in view of the complex relations which in the present day grow out of the possession of personality, how it would be possible to maintain the exemption. It would be less inconvenient to relieve real property for certain purposes from the local laws than to allow personal property to escape their operation."

The unsatisfactory character of the present situation, owing to the increasing participation of States in foreign commerce is brought out in 1 *Hyde, International Law* 448 (1922) as follows:

"It may be observed that the increasing tendency of States to acquire property abroad, and thus to participate in foreign commerce, oftentimes in a mode similar to that of a private trader, calls for general agreement establishing the effect of public ownership and of the particular uses of what is acquired, upon the duty of the territorial sovereign to yield exemption from jurisdiction. The problem is closely associated with that arising from the nationalization of ves-

sel property engaged in commercial enterprise. If the law of nations is to remain flexibly responsive to the requirements of international intercourse, definite principles should be enunciated and agreed upon, and these must serve to safeguard and promote, rather than jeopardize and retard the commercial transactions of private concerns with foreign states."

In an article, *Recent Problems in Admiralty Jurisdiction*, by Edgar T. Fell, 40 Johns Hopkins University Studies 330, in commenting on section 7 of the Act of Congress of March, 1920, the author says:

"It is indeed to be hoped that other governments may adopt the same policy in regard to their acquisitioned and government-owned merchant ships; thus frequent cases of injustice, arising from the enforcement of immunity will, in a great measure, be obviated as well as any possible international friction that might arise in the future over the large and growing number of claims of immunity on behalf of government operated merchant vessels."

In an article, *Laski, The Responsibility of the State in England*, 32 H. L. R. 447 (1919) appears a very acute criticism of immunity, which is applicable not only to the national sovereign, but also to foreign sovereigns, as follows:

" 'It is a wholesome sight,' said Maitland in a famous sentence, 'to see the crown sued and answering for its torts'."

* * * *

"The fundamental characteristic of political evolution is the notion of responsibility. If our King fails to suit us we behead

> or replace him; if our ministry loses its hold, the result is registered in the ballot boxes. But the categories of law have obstinately and needlessly resisted such transformation. The government has for the most part kept the realm of administration, beclouded by high notions of prerogative. What is here argued is the simple thesis that this is legally unnecessary and morally inadequate. It is legally unnecessary because, in fact, no sovereignty, however conceived is weakened by living the life of the law. It is morally inadequate because it exalts authority over justice."

Nothing could be more persuasive in demonstrating the modern trend as to sovereign immunity than the fact that the Versailles Treaty of Peace with Germany, which was participated in by nearly all the great powers of the world, provides in article 281 as follows:

> "If the German Government engages in international trade it shall not be deemed to have any rights, privileges or immunities of sovereignty in respect thereof."

A comment on this article by Sterling E. Edmonds in *Document No.* 156, 66th Congress, first session, is as follows:

> "This proposition is founded upon such elemental principles that it seems hardly necessary to have referred to it."

A like provision appears in the Treaty of Peace between the Allied and Associated powers of Austria, signed at Saint-Germain en-Laye, September 10, 1919, as follows:

> "If the Austrian Government engages in international trade, it shall not in respect

thereof have or be deemed to have any rights, privileges or immunities or sovereignty."

Congress has not seen fit to declare any statutory immunity except article 4063, of the Revised Statutes, protecting foreign ministers as follows:

> "Whenever any writ or process is sued out or prosecuted by any person in any court of the United States, or of a State, or by any judge or justice, whereby the person of any public minister of any foreign prince or state, authorized and received as such by the President, or any domestic servant of any such minister, is arrested or imprisoned, or his goods an dchattels are destroyed, seized, or abandoned, such writ or process shall be deemed void."

Section 9 of the Shipping Board Act of September 7, 1916, providing that vessels not belonging to the United States, when used solely as merchant vessels, shall be subject to all laws and liabilities, governing merchant vessels, which was re-enacted by the Merchant Marine Act of 1920, approved June 5, 1920, clearly show the view of Congress that there should be immunity as to vessels of the United States engaged in trade.

This act was passed upon in *The Lake Monroe*, 250 U. S. 246 (1919), holding, on application for prohibition, that the District Court had jurisdiction, Pitney, *J.*, saying that this restriction of immunity was deemed by Congress to be essential to subject such vessels to the same duties and liabilities as privately-owned merchant vessels, with which they competed.

While the effect of this proviso is modified by the Suits in Admiralty Act of March 9, 1920, so far as process *in rem* is concerned, its practical purposes are satisfied by the provision for suits *in personam*.

Section 7 of the Suits in Admiralty Act, while not prejudicing a claim of immunity in foreign countries, provides for the claiming of immunity and giving of bond to release vessel.

When the railroads were taken under Federal control in the United States the will of Congress, that there should be no immunity, was expressed in Section 10 of the Federal Control Act of March 21, 1918, continuing liability of the carriers under Federal control, except that process could not be levied against property under Federal control. This section was dealt with in *Missouri Pacific Railroad Company* v. *Ault*, 256 U. S. 554 (1921). It was held that as to liabilities arising after the government had taken possession, action should be brought against William G. McAdoo, Director General of Railroads pursuant to General Order No. 50.

This examination of the English and American cases as well as those on the Continent, the statements of writers of International Law, the action of international conferences and the tendency of legislation seem to warrant three conclusions.

1. There is a growing tendency on the part of governments to take on new activities not strictly political.

2. Where the strict rule of legal immunity is followed there is a growing volume of adverse criticism even by the judges who feel bound by the rule of *stare decisis*.

3. There is a growing tendency to limit immunity by legal decision, voluntary submission to suit and international agreement.

The time seems inopportune for this court, silent on the subject for more than one hundred years, to accept the unfortunate reversal by the Court of Appeal of Sir Robert Phillimore in the *Parlement Belge, supra,* as an adequate ground for a great extension in the law of the United States of the immunity of foreign governments.

POINT IV.

Whatever the rule may be as to securing a personal judgment against a foreign state, no property owned by a foreign sovereign, situated within the territory of the Court appealed to, should have immunity, except such as is necessary for carrying on political relations with the Government of the United States.

This point is raised by the twelfth assignment of error, which alleges that the court erred in directing that the attachment herein be vacated and the action dismissed for the reason that property of the defendants had been levied upon under said attachment, situated with the Southern District of New York, which was being used in the carrying on of a commercial enterprise within said district (fols. 188-9).

The return of Carlos R. Felix, financial agent in New York of the United States of Mexico (fols. 101-3), shows a large quantity of furniture and fixtures, including eight typewriters, eleven mahogany desks, and cash amounting to $411.29;

and similarly the return of Francisco P. de Hoyos, as general agent of the National Railways of Mexico, certifies upon the levy of the sheriff to a considerable quantity of office furniture, typewriters, and cash amounting to $49.82.

While examinations of the depositaries upon whom the attachment was served have not been made it is believed that they will disclose a considerable amount of property belonging to the Government of the United States of Mexico within the city of New York of several main sorts—oil export taxes owned by oil companies within said city to the Government of Mexico, more than eight million dollars claimed to be held for purposes of the so-called Debt Agreement and general deposits in banks or under the control of the Financial Agency of the Government of the United States of Mexico or the National Railways of Mexico, Government Administration.

It is submitted that the case of the Schooner *Exchange* goes no further than to exempt public war vessels. The test of immunity of property within a jurisdiction should not depend in any case upon ownership but upon the nature of the property and the character of its use.

Judge Knox, in the opinion in this case, brushes aside the contention of the plaintiff that an attachment necessarily gives to the action the character of a proceeding *in rem* or *quasi in rem* and that it should in any case be sustained as to property which has been mingled with and employed in a proprietary way in the general body of property within the country. Judge Knox in his opinion (fol. 180) differenti-

ates the cases *in rem*, holding government-owned merchant vessels not immune, one of which was his own decision in the *Gul Djemal* unreported, *supra*, on the ground that these cases were causes of action maritime in nature and that the ships were within the jurisdiction and for this reason the actions were *sua generis*.

It is submitted that no just distinction can be drawn between immovable property which is generally deemed subject to the local jurisdiction and personal property, nor any distinction which proceeds merely upon the difference between an action at common law and in admiralty, or a difference between an action purely *in rem* or one *quasi in rem*.

This court is thoroughly familiar with the distinction between a judgment binding property attached and a judgment valid *in personam*. In *Dewey* v. *Des Moines*, 173 U. S. 193 (1899), it was held that a state could not impose personal liability for an assessment for a local improvement upon a non-resident. This did not preclude the holding of the property itself. Peckham, *J.*, says:

> "A judgment without personal service against a non-resident is only good so far as it effects the property which is taken or brought under the control of the court or other tribunal in an ordinary action to enforce a personal liability, and no jurisdiction is thereby acquired over the person of a non-resident further than respects the property so taken. This is true in the case of an assessment of such a nature as this one as in the case of a more formal judgment."

In a number of cases it has been held that a foreign sovereign may be made party to a suit, the purpose of which is to determine the title to property or the existence of an interest in a fund. If this is permissible where such title or equity exists at the time of suit brought it is equally practicable to exercise the power where the lien is created by process of attachment at the time of the institution of the suit. Certain writers maintain that neither ownership nor ownership coupled with possession is a sound basis for immunity but that the real test should be the nature of the use to which the exempt property is put. If such property is necessary to enable the sovereign to perform his political functions, as was the case in the ship of war involved in the Schooner *Exchange, supra,* immunity may be proper, but it is an entirely different proposition to hold that property employed in trade in precisely the same manner as all private property similarly used should receive different treatment because title is in a foreign government. It is one thing to hold, as in *Vavasseur* v. *Krupp,* that shells for military use could not be held, and an altogether different thing to decide that office furniture may be employed in a railway purchasing office and be immune from the claims of the railway clerks for their salaries or of the landlord for the rent of such office. Can millions of dollars be held as deposits in the banks of our cities and such property be free from the liabilities to which all property is subject, because a foreign government has title? It is true that in France before the French Revolution there was one law for the

King and another for the Noble and many special exemptions and privileges of every sort. But it is contrary to the whole spirit of American law and life that inequality in legal right should exist between persons engaged in like activities because of their personal status.

In *Strousberg* v. *Republic of Costa Rica*, 44 L. T. N. S. 199 (1881) it was held that no order for substituted service should have been issued against a foreign state. The court held that the action was not in the nature of a counter-claim. Jessel, *M. R.*, said that in the case of a counter-claim the sovereign state may be made defendant, and adds:

> "There have been, in addition to these cases of cross-action upon counter-claim, cases in which a foreign sovereign or foreign state has been interested in certain funds in the hands of other persons who were within the jurisdiction of the court, and it has been desirable to give such foreign sovereign or foreign state an opportunity of asserting any claim to the fund or property; and in such cases service has been directed with that view, not with the view of obtaining payment from the foreign sovereign or the foreign state, but merely with a view to enable the foreign sovereign or state to assert a claim to the property in dispute. This is simply an action against a foreign state, and no such action can be maintained."

In *Lariviere* v. *Morgan, supra*, Lord Hatherley, Lord Chancellor, is of the opinion that a trust could be enforced although a foreign government might be one of the *cestuis que* trust. The reversal of this case by the House of Lords went

entirely upon the ground that a letter opening a credit for the contractors who were to furnish cartridges did not create a trust.

In *Sharps' Rifle Manufacturing Co.* v. *Rowan*, 34 Conn. 329 (1867) it was held that an action was maintainable to compel the conveyance of real estate, title to which stood in the name of an agent of the British Government. Hinman, *J.*, says:

> "In disposing of the question thus presented, it is not necessary for us to decide whether a foreign sovereign could be sued in our courts upon a contract entered into by such sovereign with our own citizens; nor whether, where such a sovereign is interested in real estate within this state, our courts can entertain a bill in equity to which such sovereign is made a direct party, for the purpose of adjudicating the rights of various parties in the property. The question here is, whether a suit can be maintained for the adjudication of the rights of different parties to real estate situated in this state where the party in whom the title stands on the public records and who alone is made respondent in the suit is a private person, but who is in fact a trustee for a foreign sovereign. On this point it is our opinion that the jurisdiction of the court is determined by the character of the party of the record, and is not affected by the fact, though brought upon the record by the pleadings, that the respondent is a mere nominal party, and the party represented by him and having the real interest is beyond the jurisdiction of the court."

In *Kingdom of Roumania* v. *Guaranty Trust Company, supra*, the court in refusing to permit

interpleader does so upon the ground that no facts were alleged which made the deposit a trust fund. Similarly, the decision in *Hewitt* v. *Speyer, supra,* holds that there was no equity against the fund for the reason that the act of the sovereign in the foreign territory in making payment of the customs duties to the defendant could not be inquired into.

Several of the cases which are supposed to create the distinction between the English and American law that there is no immunity unless the property is both owned and in the possession of the government are equally explicable on the ground that the property in question was not being employed for a governmental purpose. This was true of the cotton subject to salvage in the *Davis, supra;* it was true of the launches which had not reached the Mexican Government in the case of *Long* v. *Tampico, supra.* And it would explain the dictum of Mr. Justice Gray in *Tucker* v. *Alexandroff, supra,* that there is no precedent for extending exemption to an uncompleted ship.

In *The Fidelity, supra,* dealing with a tug owned by a municipal government, Chief Justice Waite said:

> "Property does not necessarily become a part of the sovereignty because it is owned by the sovereign. To make it so it must be devoted to the public use and must be employed in the carrying on of the operations of the government."

The nature of the property is made the test of immunity in *Halleck on International Law,* page 235, as follows:

> "No proceedings *in rem* can be instituted against the property of a sovereign prince if the *res* can in any fair sense, be said to be connected with the *jus coronæ* of the sovereign, but other property of a prince may be proceeded against *in rem*."

Hall on International Law, 180 (7th Edition) points out that a distinction between real and personal property by which personal property is treated as exempt is not only irrational in itself but for certain purposes it would be less inconvenient to relieve real property from local laws than to allow personal property to escape their operation.

Westen, Actions Against the Property of Sovereigns, 32 H. L. R. 266, states:

> "Any constitutional use of property must be conclusively presumed to be public, but government ownership, apart from active use in the business of government, should not necessarily impute to property a public character. In the enforcement of judgments against municipal corporations a distinction is commonly made between property owned for profit and charged with no public trusts or uses, which may be sold on execution, and property used for public purposes, such as hospitals, fire engines, waterworks and the like, which is exempt from execution. This distinction is applicable to cases against the property of sovereigns, and government use furnishes a more rational and less fortuitous test than government possession."

Stinson, The Requisitioned and the Government-Owned Ship, 20 Mich. L. R. 407, says:

> "The test in all these cases, whether the vessel be under requisition or otherwise in the ownership and operation of government, is the use of the ship or the destination of the property to commercial uses rather than ends of state."

If this Court is of the opinion that all property within the jurisdiction is held subject to the ordinary operation of the law, foreign sovereigns can readily be protected by releasing from attachment or execution property actually used in the performance of such political functions as are deemed immune. Or, if the Court prefers, it may be held that property held by a foreign government in a proprietary capacity may be held to satisfy obligations for contract or tort, either in actions purely *in rem* or in actions in which by attachment or otherwise claim is made against such non-immune property.

POINT V.

Jurisdiction having fully attached by the personal service of process upon managing agents of defendants doing business within the Southern District of New York in October, 1922, was not divested by the recognition of the Government of Mexico on August 31, 1923.

This point is fully raised by the third and fourth assignments of error (fols. 186-7).

This point rests upon three propositions:

1. An unrecognized government is not immune.

2. The Federal law and not that of New York is controlling on the status of an unrecognized government.

3. Although recognition is retroactive so far as title are concerned it does not operate to divest jurisdiction when once acquired.

as titles are concerned it does not operate to di-

1. Mexico not having been recognized at the time action was commenced had no immunity. As appears by the certificate of the sheriff of New York County personal service was made of the summons with notice on the Government of the United States of Mexico on October 18, 1922 in New York County by leaving the same with Carlos R. Felix, as managing agent of said defendant, and upon the National Railways of Mexico on October 23, 1922 by leaving the same with Francisco P. de Hoyos, as managing agent of thereof (fols. 94-5). The agency of such persons is admitted by their own description in the petition for removal (fol. 29), and in the certificates of property on levy (fols. 101 and 105), and the service is admitted in the petition for removal (fol. 21), and the affidavit of Jerome S. Hess (fol. 64).

That the Government of Mexico had not been recognized at this time appears from the letter of Charles E. Hughes to the Governor of New York dated October 27, 1922, in which letter there is no suggestion that the attachment should be lifted except as regards the archives and official property of the Acting Mexican Consul General (fols. 79-80), to which request the plaintiff voluntarily acceded (fol. 89). Upon the argument

on January 23, 1923 of the order to show cause upon which the order now reviewed was made, the District Attorney of the United States presented to the court a telegram from Attorney General Daugherty as follows:

> "The Government of the United States has at present no official relations with the administration now functioning in Mexico. This fact however does not affect the recognition of the Mexican state itself which for years has been recognized by the United States as an 'international person' as that term is understood. In international practice the existing situation simply is that there is no official intercourse between the two states end quote" (fol. 117).

It has long been the established rule that neither the State Courts nor the Federal Courts have the power to make an independent determination of a political question. The certificate of the executive authorities of the United States is therefore conclusive as to the status of the Government of the United States of Mexico at the time of action brought.

In *Jones* v. *United States*, 137 U. S. 202 (1890) Mr. Justice Gray said:

> "Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens and subjects of that government. The principle has always been upheld by this court, and has been affirmed under a great variety of circumstances."

Whether a foreign government is entitled to immunity is a question of public international law. No decision of a state court can bind the courts of the United States upon such a question whether they are called upon to determine the jurisdiction of the state court prior to removal or of the federal courts.

That the Mexican State had been for years recognized as an "international person" is of no significance upon the question as to whether a particular administration or government functioning in Mexico had been recognized. Immunity from suit is a transcendent privilege conferred as matter of comity, and comity in turn arises only from recognition granted to the government claiming the privilege. In the case of *Gul Djemal, supra,* upon the point that immunity springs from comity, Judge Knox said:

> "But irrespective of what has already been said, I am of opinion that at the time of the seizure of the *Gul Djemal* she enjoyed no immunity from such restraint, inasmuch as diplomatic relations between the United States and Turkey were then severed, and that, therefore, the comity and courtesy due from this country to Turkey did not, in the absence of appropriate suggestion from the State Department of this Government, require the extension of such immunity."

In the case of *Hussein Lutfi Bey, supra,* in denying prohibition, Judge Van Devanter said, page 56 of this brief, that question whether im-

munity can be claimed when diplomatic relations have been severed is new, important and debatable.

That immunity rests upon comity was early stated by the United States Supreme Court in the *Santissima Trinidad, supra,* at page 352.

Judge Haight in the *Johnson Lighterage Company, supra,* says:

> "The immunity granted to friendly foreign governments rests upon international comity."

It is submitted that the decisions that an unrecognized foreign government cannot sue are authoritative for the reason that immunity from suit is a much greater concession to sovereignty than the mere right to appear in the courts.

Two recent decisions in the Federal Courts have dealt with the question of the right to sue. In *The Penza,* 277 Fed. 91 (D. E. N. Y. 1921), Judge Manton held that the Russian Socialist Federated Soviet Republic, not having been recognized, could not sue, stating that the decision by the executive authorities as to what government is sovereign binds the judiciary. A similar decision was by Judge Dietrich, in *The Rogdai,* 278 Fed. 294 (D. N. Cal. 1920).

In *Russian Socialist Federated Soviet Republic* v. *Cibrario,* 198 App. Div. 869 (1921), it was held that a non-recognized government could not sue. Judge Dowling wrote an elaborate opinion as to the effect of recognition. This case was affirmed in 235 N. Y. 255 (1923), Judge An-

drews writing an excellent opinion and squarely placing the right to sue upon comity, which, he said, exists only after recognition.

Judge Andrews explains the previous decision of *Wulfsohn* v. *Russian Socialist Federated Soviet Republic, supra,* in which also he wrote the opinion, either upon the ground that there was no party before the court, or that an independent government is not answerable for its acts before our courts, this having been the case of seizure in Russian of furs by the Soviet Government. Judge Andrews says:

> "We reach the conclusion, therefore, that a foreign power brings an action in our courts not as a matter of right. Its power to do so is the creature of comity. Until such government is recognized by the United States, no such comity exists. The plaintiff concededly has not been so recognized. There is, therefore, no proper party before us. We may add that recognition and consequently the existence of comity is purely a matter for the determination of the legislative or executive departments of the government. Who is the sovereign of a territory is a political question. In any case where that question is in dispute the courts are bound by the decision reached by those departments. (*Jones* v. *U. S.*, 137 U. S. 202; *Luther* v. *Sagor, supra,* 556.) It is not for the courts to say whether the present governments of Russia or Mexico or Great Britain should or should not be recognized. They are or they are not. That is as far as we may inquire. Nor is anything here decided inconsistent with *Wulfsohn* v. *Soviet Republic* (*supra*). Upon the facts in that case, if the defendant was not an existing

> government it might not be sued. There was no party before the court. If it were, as we alleged and admitted, the same result followed, not because of comity, but because an independent government is not answerable for its acts to our courts."

An application to vacate an attachment was denied in *Lehigh Machine Company* v. *Russian Socialist Federated Soviet Republic* and another, Supreme Court, New York County, reported in the New York *Law Journal* of February 27, 1923, as follows:

> "As the cause of action is based upon transactions with the representative of the Soviet Government as such in the United States, the case cited by the moving party (*Wulfsohn* v. *Russian Soviet Republic,* Court of Appeals, January 9, 1923) seems inapplicable, and the motion to vacate is denied."

Halleck on International Law, 129, dealing with the rights of a sovereign, conditions them on recognition:

> "The sovereign or ruler of a state is considered, in international law, as representing, in his person, its sovereign dignity. It matters not whether he is a monarch or a president, whether he is the *de facto* or the *de jure* head of a state (if he has been duly recognized as such); custom has invested his person with certain international rights as the representative of his state."

Nowhere is the principle better stated than by Scrutton, *L. J.*, in the case of *Aksionairnoye*,

etc. v. *James Sagor & Company,* L. R. (1921) 3 K. B., 532, at page 555, as follows:

> "What the Court cannot do directly it cannot in my view do indirectly. If it could not question the title of the Government of Russia to goods brought by that Government to England, it cannot directly question it in the hands of a purchaser from that Government by denying that the Government could confer any good title to the property. This immunity follows from recognition as a sovereign state. Should there be any government which appropriates other people's property without compensation, the remedy appears to be to refuse to recognize it as a sovereign state. Then the Courts could investigate the title without infringing the comity of nations. But it is impossible to recognize a government and yet claim to exercise jurisdiction over its person or property against its will. Further, the Courts in questions whether a particular person or institution is a sovereign must be guided only by the statement of the sovereign on whose behalf they exercise jurisdiction."

Immunity comes from comity and comity in turn arises only from recognition of the alleged sovereign.

In *The Annette,* L. R. (1919) Prob. 105, the libeling of an Esthonian vessel, sequestered by the Provisional Government of Northern Russia, was permitted, the court saying that before it could recognize the immunity of such Provisional Government, it must be satisfied of the recognition of said Government by the British Government.

In *Fenton Textile Association* v. *Krassin,* 38 T. L. R. 259 (C. A. 1921) it was held that Krassin,

an official agent under the trade agreement of March 16, 1921, giving the Soviet Government *de facto* recognition, had no immunity, Bankes, *L. J.*, says:

> "It is not disputed by the appellant's counsel that recognition by the Government of this country of a status sufficient to carry with it the immunity claimed by the appellant is necessary to establish that immunity."

Justice Kay, writing the opinion in the *Republic of Peru* v. *Dreyfus Brothers,* 38 Chan. Div. 348 (1888), held that the recognition by France of the revolutionary, *de facto* Government of Peru, fixed its status as to a French contract and in the course of the opinion cites the refusal of the English courts to permit actions by unrecognized Governments of Berne and Colombia, saying:

> "These are decisions that a government not so recognized cannot sue in the courts of a foreign country."

The New York Court of Appeals has suggested in the *Wulfsohn* case, *supra,* that the hands of the State Department would be tied if foreign governments could be sued, and that it would find itself involved in disputes which it might think unwise. The reversal of this seems quite as likely to be true. If the government is not sufficiently stable or trustworthy to be recognized, the State Department may very well welcome the help of the courts in securing the protection of the rights of American citizens. If the various courts assume to confer immunity,

which is one of the principle advantages of recognition, the state department may soon find the value of the political weapon of withholding recognition greatly impaired. The following propositions seem reasonably clear:

1. In proportion as recognition is of value to the foreign government the power of the State Department is increased.

2. Stated conversely, every considerable disadvantage attendant upon non-recognition strengthens the hands of the State Department in negotiations.

3. All advantages flowing from recognition increase the willingness of the unrecognized government to make concessions in order to secure such advantages.

4. Immunity from suit is a transcendent privilege to be conferred only upon governments which can be trusted to deal fairly with our nationals.

5. When the State Department deals with irresponsible governments from which redress cannot be secured through diplomatic channels, it should aid our citizens in securing relief by any reasonable means including redress through our courts so far as they are able to afford redress.

6. Reprisals in kind by unrecognized governments are so improbable as to be of negligible importance.

7. Ability to borrow is of first rate importance to governments. If the funds of unrecognized governments are open to attachment, financing without recognition becomes very difficult, capital being traditionally timid. The free progress of such litigation would tend to discourage financial intercourse with foreign governments until the State Department has given its sanction.

Applying these principles, it is submitted that there is no political reason why immunity from suit should be conferred upon an unrecognized government.

2. The Federal law is controlling as to the status of an unrecognized government.

In determining whether there was jurisdiction in the Supreme Court of the State of New York prior to removal, this court will determine for itself the question as to whether a non-recognized government may claim immunity. It is true that by the principle stated in *Lambert Run Coal Company* v. *B. & O. Company*, 258 U. S. 377 (1922), if the state court lacks jurisdiction of an action prior to removal, the federal court acquires none, although it might, in a like suit originally brought there, have had jurisdiction. It is not contended that the Supreme Court of the State of New York is not a court of general jurisdiction or that any constitutional or statutory rule was involved in the *Wulfsohn* case, *supra*, on which the defendant relies. The New York Court of Appeals, as above pointed out, has itself explained the *Wulfsohn* case upon grounds not involving the question of immunity. The *Wulfsohn* case is now upon the calendar of this court for review on the ground that it deprived the plaintiff of property without due process of law. Whether recognition is necessary to the existence of immunity is a question resting on the constitutional power of the Executive of the United States in regard to foreign relations and the rule of international law as to immunity. Upon such questions the Federal Court will reach its own conclusion, irrespective

of decisions of the state courts. It has long been held that the very purpose of removal would be defeated if local determinations were to conclude the Federal Courts. The law is thus stated in *Courtney* v. *Pradt*, 196 U. S. 89 (1905):

> "The case was dismissed for want of jurisdiction over it as a suit against a foreign executor in the courts of Kentucky. The court has power to so adjudicate. When a case has been removed into the Circuit Court on the ground of diversity of citizenship that court is entitled to pass on all questions arising, including the questions of jurisdiction over the subject matter in the State courts or the sufficiency of the service of mesne process to authorize recovery of personal judgment."

In *Goldey* v. *The Morning News*, 156 U. S. 518, an action had been removed from the Supreme Court of New York, service having been made upon the President of the defendant corporation, while temporarily in New York. It was held that the Federal courts would decide the question of jurisdiction of the New York courts without reference to the fact that such service had been held valid by the Court of Appeals of New York and reached the decision that the New York courts had not acquired jurisdiction.

To the same effect is *Zurich General Accident Company* v. *Imperial Wheel Company*, 277 Fed. 71 (1922).

In *Mechanical Appliance Company* v. *Castleman*, 215 U. S. 437 (1910), at page 443, Judge Day says:

> "Moreover, in cases which concern the jurisdiction of the Federal courts, notwith-

> standing the so-called conformity act Revised Stats., Sect. 914, neither the statutes of the State nor the decisions of its courts are conclusive upon the Federal courts. The ultimate determination of such questions of jurisdiction is for this court alone."

See also *Conley* v. *Mathieson Alkali Works*, 190 U. S. 406 (1903); and *Western Loan Company* v. *Butte and Boston Company*, 210 U. S. 368 (1907).

It will be noted, therefore, that in the cases upon which the defendant relies, there was no jurisdiction of the subject matter of the suit. In the case at bar, we have an ordinary contract action brought in the highest court of original jurisdiction of the state, which is a court having general jurisdiction and the decisions of the Supreme Court clearly show that the question as to the existence of jurisdiction in such court is to be determined by the Federal Court.

3. Jurisdiction having attached was not divested by subsequent recognition.

The decision of Judge Knox does not purport to deal with the state of facts which existed at the time that the motion for dismissal was made. Opinion of Judge Knox, fols. 177-180.) In the certificate of Judge Knox (fols. 183-4) on the question of jurisdiction he states that the Court has sustained the motion to dismiss on the sole ground that the defendant, The Government of the United States of Mexico, has been duly recognized by the United States of America, and diplomatic relations between the two governments have been resumed and that the Govern-

ment of the United States of Mexico is therefore under the law of nations and the principles of comity, entitled to immunity from suit in the Courts of the United States of America, unless upon its own consent, which, in this instance, has not been given. In the opinion he rejects the plaintiff's contention that jurisdiction having attached is not divested by subsequent recognition (fols. 178-9).

An unjust reward is thus bestowed upon the defendant for delaying and hampering the plaintiff in the progress of the suit. Having secured an order extending its time to appear or move to November 28, 1922, it then removed the proceeding to the Federal Court, thus securing thirty days after removal, namely, until January 6, 1923, to plead. It then secured by stipulation and order thereon (fol. 144) an extension to January 13, 1923, and then made the motion to dismiss, which was argued January 23, 1923.

Judge Knox in his opinion states that he intentionally delayed decision to await the result of the negotiations between the Commissioners of the United States and Mexico (fols. 175-6):

> "Due to circumstances over which I had no control, a ruling upon the motion was delayed for several weeks. In the meantime, certain negotiations and conferences began between Commissioners acting upon behalf of the United States and certain others representing the Mexican Government. Believing that there was some likelihood that these conferences would be followed by the recognition of the Mexican State by our Government, it seemed not improper to delay a decision upon the motion for some rea-

> sonable time in order to learn whether the ultimate result of the negotiations would have any relevant bearing upon the motion. Counsel for the parties were advised of my contemplated purpose, whereupon I proceeded to await developments."

On May 28 and June 11 Judge Knox told the attorneys that he was prepared to hand down a decision and would do so unless he received word from the State Department (fol. 163). On June 11, 1923 the plaintiff by its counsel, Robert F. Greacen, Hon. James A. Reed and Alfred Hayes, vigorously pressed the Court for a speedy decision of the question of jurisdiction, and the attorneys for the defendant, The Government of the United States of Mexico, argued in opposition to such request (fols. 149, 156).

In a letter of Howard T. Oliver to Charles E. Hughes dated October 1, 1923, attached as an exhibit to Mr. Oliver's affidavit, verified October 10, 1923, it is stated that the Secretary of State said on June 14 that he believed a decision would be unwise at that time (fol. 163). It is submitted that the Secretary of State had absolutely no authority to interfere or influence the withholding of a decision of the motion; and that the defendant, The Government of the United States of Mexico, cannot claim advantage from immunity secured pending such delay. In 5 *Opinions of the Attorney General* 69, in 1849, Attorney General Buchanan says:

> "It is not in the power of the Secretary of State to interfere directly in the matter. The laws of the United States, while they strictly enforce the law of nations in this

> particular, and vindicate the principles of the extra-territoriality of the minister, his family, and other persons attached to the legation, securing to their persons and personal effects perfect immunity from arrest, seizure, or violence, yet are not administered by the Secretary of State, nor has he any authority to interfere with their administration. That belongs to the judicial tribunals."

In any case it is submitted that jurisdiction, having once attached, is not defeated by the subsequent recognition. In 15 *Corpus Juris* 824, Courts, the general rule is thus laid down:

> "It is well established as a general rule, that jurisdiction once acquired is not defeated by subsequent events, even though they are of such a character as would have prevented jurisdiction from attaching in the first instance. So when jurisdiction of the person or the *res* has once attached, it is not defeated by a removal of the person or the *res* beyond the jurisdiction of the court."

Ricaud v. *American Metal Company*, 246 U. S. 304 (1918) held that the fact that property had been seized and sold for war purposes under the authority of General Carranza, whose government was later recognized by the United States, did not deprive the courts of jurisdiction to adjudicate upon the validity of the title, although in exercising the jurisdiction, the action of the Mexican authorities must be accepted as a rule of decision. It is very important to note that whether or not a defense on the merits can be set up, after the complaint has been filed and served herein and a general appearance made

by the defendant, on the ground that recognition validates acts of the Government of Mexico within its own territory, no such defense can be considered in determining whether or not the defendant is immune from the jurisdiction of the court. Judge Clarke makes this distinction very clearly, saying:

> "This recognition is retroactive in effect and validates all of the actions of the Carranza Government from the commencement of its existence (*Williams* v. *Bruffy*, 96 U. S. 176, 186; *Underhill* v. *Hernandez*, 168 U. S. 250, 253), and the action of General Pereyra complained of must therefore be regarded as the action, in time of civil war, of a duly commissioned general of the legitimate Government of Mexico.
>
> "It is settled that the courts will take judicial notice of such recognition, as we have here of the Carranza Government, by the political department of our Government (*Jones* v. *United States*, 137 U. S. 202), and that the courts of one independent government will not sit in judgment on the validity of the acts of another done within its own territory (*Underhill* v. *Hernandez*, 168 U. S. 250, 253; *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347; *Oetjen* v. *Central Leather Co., ante*, 297). This last rule, however, does not deprive the courts of jurisdiction once acquired over a case. It requires only that, when it is made to appear that the foreign government has acted in a given way on the subject-matter of the litigation, the details of such action or the merit of the result cannot be questioned but must be accepted by our courts as a rule for their decision. To accept a ruling authority and to decide accordingly is not a surrender or abandonment of jurisdiction but it is an ex-

> ercise of it. It results that the title to the property in this case must be determined by the result of the action taken by the military authorities of Mexico and that giving effect to this rule is an exercise of jurisdiction which requires that the first question be answered in the affirmative."

To the same effect is *Molina* v. *Comision*, 92 N. J. L. 38 (1918), in which a motion to strike out the complaint was denied on the ground that the rule that our courts will not sit in judgment on the validity of the acts of another independent government does not deprive the courts of jurisdiction, once acquired. Judge Swayze, says:

> "Even if counsel for the defendant are right in their contention that the henequen said to have been converted by the defendant had all of it been sold to the defendant by the authority of the Government of Mexico or of Yucatan, it would not be my duty to dismiss the complaint. The rule was stated by the United States Supreme Court in *Ricaud* v. *American Metal Co.* Justice Clarke for the court says that the rule that the courts of one independent government will not sit in judgment on the validity of the acts of another done within its own territory, does not deprive the courts of jurisdiction once acquired over the case. It requires only that when it is made to appear that the foreign government has acted in a given way on the subject-matter of the litigation, the details of such action or the merit of the result cannot be questioned, but must be accepted by our courts as a rule for their decision. To accept a ruling authority and to decide accordingly is not a surrender or abandonment of jurisdiction, but an exercise of it."

In *Lockwood* v. *Coysganne*, 3 Burr. 1676 (1765), Judge Mansfield discharged a rule to set aside execution on the ground that the defendant was a physician of a Bavarian Minister, saying that a person could not be taken into the service of a foreign minister in order to protect him. He says:

> "And, indeed, this would give a foreign minister a power to dispense with the private debts of the subjects of this country."

To the same effect is *Heathfield* v. *Chilton*, 4 Burr. 2015 (1767), in which Lord Mansfield says:

> "But supposing him to be a minister of such a kind as entitles him to privilege; yet I think this is not a case of privilege by the Law of Nations, for the defendant does not appear to have been in the service of the minister at the time of arrest.
>
> "A public minister shall not take a man from the custody of the law; though the process of the law shall not take his menial servant out of his service."

Mr. Justice Ashton says:

> "If a man has no such privilege, at the time of his being arrested, no subsequent privilege can be given him, by being afterward taken into the service of a public minister."

In *Koppel* v. *Heinrichs*, 1 Barb. 449 (1847), the defendant was appointed consul of a foreign government after action brought. Harris, *J.*, says:

> "The general rule on the subject of jurisdiction is that it depends on the state of

things at the time the action is brought; and if the circumstances be such, then, as to vest jurisdiction, the same cannot be ousted by any subsequent event. (*Mollan* v. *Torrance*, 9 Wheat. 537.) If there can be said to be any exception to this rule, it is when such a change in the parties takes place after the commencement of the suit as to work an abatement. It was insisted by the counsel who argued this motion for the defendant, that the appointment of the defendant as consul had the effect to abate the suit; that thereby he was withdrawn from the jurisdiction of the state courts. But I cannot concur with this view of the question; whether the privilege conferred upon consuls be regarded as a personal privilege, or the privilege of the sovereignty they represent. I do not think it was ever intended to extend that privilege so far as to enable a party, after a suit commenced against him in a state court of competent jurisdiction, to divest that court of jurisdiction by voluntarily accepting an office which, if held at the time the proceeding was instituted, might have been available as a valid objection to the jurisdiction of the court in which the suit was brought. No decision holding such a principle was referred to on the argument, nor do I feel called upon to adopt such a construction of the constitution and laws of the United States affecting ambassadors and consuls. Conceding that the exemption provided in behalf of these officers, is the privilege not of the person but of the state they represent, and that the provision is founded upon considerations of public policy, yet I cannot conceive that it is necessary, in giving effect to this provision, to violate the rule that the question of jurisdiction is to be determined by the state of things existing at the time the suit was commenced."

In *Ex Parte Kyle,* 67 Fed. 306 (D. W. Ark. 1895), it was held that a Cherokee court having acquired jurisdiction of a case where a citizen of that country was charged with larceny, the subsequent naturalization of the citizen does not divest the court of jurisdiction.

In *Neale* v. *Utz,* 75 Va. 480 (1881), process was served on a defendant on the day he was convicted of felony, but prior to such conviction. Held that jurisdiction continued notwithstanding the subsequent disability.

In *Morgan's Heirs* v. *Morgan,* 2 Wheat. 290 (1817), it being contended that one of the complainants had settled in the State of Kentucky after the filing of the bill, Marshall, *C. J.,* says:

> "We are all of opinion that the jurisdiction having once vested was not divested by the change of residence of either of the parties."

A like rule has been repeatedly followed in cases involving diversity of citizenship or similar questions:

Mollan v. *Torrance,* 9 Wheat. 537 (1824).
Conolly v. *Taylor,* 2 Pet. 556 (1829).
Dunn v. *Clarke,* 8 Pet. 1 (1834).
Clarke v. *Mathewson,* 12 Pet. 164 (1838).
Stewart v. *Dunham,* 115 U. S. 61 (1885).
Hardenbergh v. *Ray,* 151 U. S. 112 (1894).
Louisville Railway Co. v. *Louisville Trust Co.,* 174 U. S. 552 (1899).
Sternberger v. *Continental Mines Co.,* 259 Fed. 293 D. Col. (1919).

Wichita Railroad Co. v. *Public Utilities Commission,* 260 U. S. 48 (1922).

People of Porto Rico v. *Fortuna Estates,* 279 Fed. 500 (C. C. A. 1st 1922).

Upton & Williamson v. *The New Jersey R. R. Co.,* 25 N. J. Eq. 372 (1874).

Simmons v. *Pepe,* 43 Misc. 661 (1904).

Roof v. *Meyer,* 2 How. Pr. N. S. 20 (1885).

Hodgens v. *The Columbia Co.,* 103 Misc. 415 (1918).

So far as the question of jurisdiction is concerned, the plaintiff is entitled to insist that jurisdiction fully attached; that during the entire time that the action was in the State Court there was jurisdiction; that the attachment was properly issued and levied and that a valid lien was created thereby; that the order for the examination of Carlos R. Felix was improvidently vacated; that so far as the defendant, The National Railways of Mexico, Government Administration, is concerned, its time to appear or plead expired on January 6, 1923 and it is now in default and is not in position to take advantage of any plea, either in abatement or to the merits and if the recognition of the defendant, The Government of the United States of Mexico, subsequent to the institution of the suit, enables it to interpose a plea in abatement or to the merits, it must appear and make its plea in a regular way, and not attempt to secure a dismissal on a summary motion upon a ground coming into existence more than seven months after the motion has been made.

POINT VI.

The defendants, by the acts of their attorneys, have waived immunity from suit, consented to the exercise of jurisdiction, and appeared generally herein.

This point is based on the fourteenth assignment of error especially setting forth the acts relied upon, which stated in greater detail, are as follow:

1. Securing two orders extending time and a stipulation with order thereon extending time.

The summons had been served on Carlos R. Felix, as financial agent of The Government of the United States of Mexico, on October 18, 1922, and upon Francisco P. de Hoyos, as general agent of the National Railways of Mexico (Government Administration) on October 23, 1922. The time of the defendant, The Government of the United States of Mexico, to appear would have expired November 7, 1922. An order to show cause was procured by Hardin & Hess, returnable at Nyack, Rockland County, before a justice of the Supreme Court of the State of New York on November 4, 1922, why an order should not be made dismissing the action and vacating the service of the summons and vacating the writ of attachment and setting aside any levy or levies (fol. 138). Argument on this motion was adjourned (fol. 131).

Upon the affidavit of Jerome S. Hess, a member of the firm of Hardin and Hess, stating that he appeared specially "on behalf of the defendants for the purpose of procuring the an-

nexed order" (fol. 146), an order was made by Mr. Justice Tompkins, of the New York Supreme Court that:

> "the time of the defendants to appear herein or to make any motion with respect to the jurisdiction of this Court, or the service of the Summons herein, be, and the same hereby is extended to the 28th day of November, 1922" (fol. 145).

It will be noted that as the complaint has never been filed nor served, this extension could not have been more complete. It was necessary that it embody the right to appear if the defendants wished to remove the action. Abandoning the order to show cause, returnable November 4, 1922, and availing themselves of the extension, the petition of the defendants to remove to the Federal Court was filed on November 10 (fol. 18). This automatically further extended the time of the defendants to plead under the removal statute, which did not expire until January 6, 1923, the record of removal having been certified December 6, 1922 (fols. 48, 131, 142-4).

This brings us to the second extension procured by Hardin and Hess. A stipulation was prepared by them and secured from Zabriskie, Sage, Gray and Todd, the then attorneys for the plaintiff:

> "To appear specially herein for the purpose of raising any objection which the defendants, or either of them, may desire to raise to the jurisdiction of the Court, either as to the cause of action or as to the person of the defendants, or either of them, and to

make any other motion with respect to the above-entitled action," from January 6 to January 13, 1923 (fols. 131, 144, 150).

On January 5, 1923 said stipulation was indorsed "So ordered" by Jno. C. Knox, *D. J.*, and it was duly filed.

This stipulation did not preserve the right to appear. Upon the affidavit of Jerome S. Hess, verified January 12, 1923, which inaccurately stated that the time of the defendant, The Government of the United States of Mexico, to "appear" expired January 13, 1923, in the following language (fol. 67):

> "The time within which, under the law and the rules of this Court, the defendant must appear herein, expires on the 13th day of January, 1923, and it is, therefore, necessary that the defendant have an order to show cause herein returnable on January 19, 1923, and may also have its time to appear or move herein extended until after the determination of this motion, and for this reason defendant asks an order to show cause, because there is not sufficient time to have this motion heard in the regular way before the expiration of said time."

an order to show cause, upon which the order now under review was made, was secured from Judge Knox, dated January 12, 1923 which contained the following provision as to the defendant, The Government of the United States of Mexico:

> "Further ordered that said defendant's time to appear or to make any motion with respect to the jurisdiction of this Court as to the cause of action herein, or to plead

> herein, be and the same hereby is extended until five days after the entry of an order upon this order to show cause" (fol. 62).

The defendant, the National Railways of Mexico (Government Administration) not having secured such extension is now in default and judgment can be entered against it upon default in case the order now under review is reversed.

2. Making motions herein on grounds other than the absence of jurisdiction over the persons of the defendants by reason of immunity.

The first application was made to Justice Robert F. Wagner, of the Supreme Court of the State of New York, upon an affidavit made by Herome S. Hess, verified October 28, 1922, which states that he is "a member of the firm of Hardin and Hess, attorneys for the defendants herein," and that he makes affidavit for the purpose of the application only. He sets forth that Carlos Felix did not have time between receipt of notice to make return on levy of attachment and the time of service of order for examination, and prays that the order of examination be vacated (fols. 135, 137). The order of Justice Wagner of said date recites that it is made on motion

> "of Hardin and Hess appearing specially for the purpose of this application and not appearing generally, and contesting the validity of the jurisdiction of this Court over the defendants and their property and the subject matter of this action" (fol. 134).

The affidavits of Jerome S. Hess and Carlos R. Felix, verified January 12, 1923, on which the

order to show cause, upon which the order now under review was made, was procured, both state that the transactions referred to in the attachment affidavit took place in the Republic of Mexico and apparently seek to raise an issue to the merits that the action cannot be maintained for acts of the defendant within its own territories (fols. 67-9).

The opinion of Judge Knox seems to touch upon this aspect of the case (fol. 179).

The order to show cause was in the following language (fols. 61-2):

> "Why the above entitled action should not be dismissed upon the ground that said defendant is a *de facto* government of an independent foreign sovereign nation, and, therefore, is immune from process of the courts, except upon its consent, and the alleged service of the summons upon the said defendant should not be vacated and set aside upon the ground that the said service was not made in such a manner as to confer jurisdiction of this cause, and that the defendant has not been properly and regularly served herein, and why the attachment and the levies made under the attachment herein should not be vacated and set aside."

3. By applying for and securing taxable costs and disbursements.

The order under review contains the following provision:

> "Ordered that the above entitled action, be and the same hereby is dismissed with $167.50 costs and disbursements to be paid to the defendant, The Government of the United States of Mexico, by the plaintiff."

4. By appearing in court from time to time and delaying and hampering the plaintiff in the conduct of this action.

Against the strenuous opposition of the plaintiff, the attorneys for the defendant, The Government of the United States of Mexico, appeared before Hon. Jno. C. Knox and argued in opposition to the making of a speedy decision of the question of jurisdiction (fols. 149, 163). Had a decision been made at this time, the plaintiff might either have entered judgment by default, or the defendant might have unequivocally made a general appearance, as more than three months elapsed from the date when Judge Knox stated that he was prepared to hand down a decision before Mexico was recognized (fol. 163).

It is perfectly apparent from the mere recital that the defendant, The Government of the United States of Mexico, has effectively pursued a campaign of delay, and, while seeking in words to limit its appearance, has made it necessary for the plaintiff to deal not only with the question of immunity but with jurisdiction over the subject matter, the sufficiency of the service of summons, and the validity of the attachment, and has prevented the plaintiff from entering a default judgment by keeping its time to appear generally open for nearly a year. It has thus sought the full rights and privileges of a litigant, free from any burdens or obligations.

The right of the litigant to appear specially to contest jurisdiction over his person is a peculiar privilege, and if an attorney, authorized to make an appearance, fails to confine his ac-

tions strictly to such limited purpose, the party is deemed to have appeared generally. In the language of Mr. Justice Stewart in *Swecker* v. *Reynolds,* 246 Pa. 197 (1914):

> "It is absolutely just and fair that if a party wishes to insist upon an objection that he is not in court he must keep out for all purposes except to make the objection."

In 4 *Corpus Juris,* 1333, Appearances, the general rule which is illustrated by a large variety of bases, is thus stated:

> "Any action on the part of defendant, except to object to jurisdiction over his person, which recognizes the case as in Court, will constitute a general appearance."

Van Fleet, *D. J.,* in *Murphy* v. *The Herring-Hall-Marvin Safe Company,* 184 Fed. 495 (C. Nevada 1922) says:

> "The making of an order in a cause is an exercise of jurisdiction therein, and jurisdiction may be exercised only at the instance of a party; that is, it must appear and ask it. When, therefore, one applies to a Court or Judge for an order granting him relief of any character, and an order for time in which to do an act is a grant of relief * * * he necessarily appears for that purpose."

It is immaterial that the defendant characterizes his appearance as special, if in fact the act done does not relate to jurisdiction over the person.

It is well settled that a foreign sovereign may voluntarily appear; and the case of *The Sao*

Vicente, 281 Fed. 111 (C. C. A. 2nd, 1922), holds that the putting in of a claim and stipulation for value was an irrevocable waiver of immunity.

A New York case, holding that an appearance characterized as special is general if opposition to the motion involved is general, is *Matter of Atterbury*, 222 N. Y. 355 (1918).

That an unqualified extension of time operates as a general appearance has been held in a number of cases, and no case to the contrary has come to the attention of plaintiff's counsel.

In *Hupfeld* v. *Automaton Piano Company*, 66 Fed. 788, Judge Lacombe says:

> "The present motion is to set aside the service of the subpoena *ad respondendum*, and to dismiss the bill on the ground that this court has not jurisdiction of the defendants, or either of them. The defendant piano company has obtained extension of time to plead, answer, demur, or take such other action as it may be advised. This is the equivalent of a general appearance, and the motion to dismiss, as to it, is therefore denied."

In *Murphy* v. *Herring-Hall-Marvin Safe Company*, *supra*, it was held that the procuring of an extension of time operated as a general appearance. The order of extension was secretly obtained, *ex parte*, and was in the following language:

> "At the request of Messrs. McIntosh & Cook, the time of answering, appearing, moving, or otherwise pleading to the complaint or action in the above-entitled cause is hereby extended to and including the 12th day of April, 1909. Dated March 24th, 1909.
>
> "M. H. Averill, *District Judge*."

In so holding, Van Fleet, *D. J.*, said:

> "It is contended by plaintiffs, and I think correctly, that in applying for and obtaining this order the defendant must be held to have submitted itself to the jurisdiction of the state court and to have thereby estopped itself from now urging any objection to the regularity of the service of the process."

In *Everett Railway Light & Power Company* v. *United States*, 236 Fed. 806 (D. Wash. 1916) it was held that the securing of an order extending the time in which to file appearance, motion or answer, was equivalent to a general appearance, and the motion to dismiss was denied.

The case of *Waters* v. *The Central Trust Company of New York*, 126 Fed. 469 (C. C. A. 2nd 1903), is to be distinguished. Here the defendant applied in time for an order of removal. Over objection, the Court postponed the time of hearing application for removal, and the attorney, believing it necessary to sustain the right of removal, and for that purpose only, asked for an extension of the time to plead. The Court held that this should be construed as an application for an extension of the time to appear for the purpose of preserving the right of removal.

In *Placek* v. *American Life Insurance Company*, 288 Fed. 987 (D. W. Wash. 1923), a motion to quash service was denied. Judge Cushman says:

> "Defendant's first appearance in this action was as a party to a stipulation agreeing that 'the time within which the defendant may plead to the plaintiff's complaint herein

be, and the same hereby is extended for a period of thirty days.' Upon this stipulation, presumably, at defendant's solicitation, the Court by order granted such extension of time. This constituted a general appearance by the defendant invoking the Court's jurisdiction in asking such extension of time. It also amounted to an implied agreement with plaintiff that defendant would plead to plaintiff's complaint and reserve no right to attack the process, service, or jurisdiction over aught but the subject matter."

In re Moore, 209 U. S. 490 (1908), it was held that the signing of a stipulation giving the defendant time to answer was an acceptance of the jurisdiction of the Federal Court.

The case of *Yanuszauckas* v. *Mallory Steamship Company*, 232 Fed. 132 (C. C. A. 2nd 1916); and *Kuzma* v. *Witherbee Company*, 232 Fed. 286 (D. E. N. Y. 1915) are cases holding that an extension did not amount to a general appearance where procured to secure time to plead in case the motion made should be dismissed.

That, notwithstanding words of limitation, a motion having challenged the jurisdiction of the court over the subject matter of the action, must be deemed to constitute a general appearance was held in *Mahr* v. *Union Pacific Railway Co.*, 140 Fed. 921. Whitson, *D. J.*, says:

> "The right to make a special appearance is not a substantial one inherently existing; it is a privilege allowed by practice, and it must be exercised under the rules of procedure. Whenever a litigant appears to deny jurisdiction over his person, which would otherwise exist but for the failure to pursue the methods prescribed by law for bringing

him into court, he must confine himself to that particular branch of jurisdiction. It is a matter of indifference to him whether or not the court has jurisdiction over the subject matter; so long as it has no jurisdiction over his person, it cannot in any way injuriously affect his interests. He must therefore be content to stop with the suggestion that the summons or notice, as the case may be, required by the law to be served, has not been served, and that the court is therefore not entitled to deal with him in the absence of such service. As to whether the court has jurisdiction over the matter embodied in the complaint he need give himself no concern. If he does, in a transitory action, and enters upon a discussion of that question or makes a challenge as to that point, he waives the want of service, and enters voluntarily into a controversy which goes to the merit, and thereby submits to the jurisdiction of the court over his person."

Southern Pacific Coast v. *Arlington Heights Fruit Company,* 191 Fed. 101 (C. C. A. 9th, 1911) appears to take a contra position.

In *Nickels* v. *The Pullman Company,* 268 Fed. 610 (D. W. Va. 1920), McDowell, *J.,* points out that submitting to the Federal Court the question of the validity of the service of summons in the State Court waived the right to stay out of the Federal Court.

In *Sterling Tire Corporation* v. *Sullivan,* 279 Fed. 336 (C. C. A. 9th 1922), it was held that counsel, having appeared in proceedings for the instruction of a receiver and having approved the order of the Court, had appeared generally, although stating that he appeared specially.

The purpose of the amendment, Section 29 of the Judicial Code, requiring that parties removing shall plead, was probably for the prevention of delay by motions. If so, this purpose has been conspicuously defeated in the case at bar. In *Cain* v. *Commercial Publishing Company*, 232 U. S. 124 (1913), McKenna, *Justice*, says:

> "It is clear, therefore, that plaintiff gives too restrictive a meaning to the word 'plead' in Section 29. It must be construed to include a plea to the jurisdiction, and, so construing it, all of the provisions for removal of causes become accordant and their purposes fulfilled—the right to a speedy disposition of the suit to the plaintiff and the right of the defendant to have all questions determined by the Federal tribunal."

See also on the same point *Wena Lumber Company* v. *Continental Lumber Company*, 270 Fed. 795 (D. S. Miss. 1921).

It is submitted that the applications to the Court for delay and the taking of affirmative relief in the form of a judgment for costs are acts of unequivocally recognizing the jurisdiction of the Court.

POINT VII.

The defendant, National Railways of Mexico, is suable, being a governmental administrative body in the nature of a public corporation and regularly transacting business as such in the Southern District of New York, and is now in default.

Some confusion has arisen in this action through the fact that the National Railways of Mexico, a corporate entity, incorporated in the City of Mexico March 28th, 1908, and which is the owner of the principal system of railways in Mexico, has not since 1914 been in possession or control of the property of the corporation, and has not operated the same. This corporate shell maintains an office at 25 Broad Street, New York, its resident vice-president being E. E. Bashford. This corporation is not a defendant herein.

The National Railways of Mexico, administered by the Government, maintains an office in the Woolworth Building, 233 Broadway, New York, the attachment affidavit of Howard T. Oliver made it perfectly clear that his dealings were with the railway as administered by the government (fols. 33-34), and the disclaimer of the plaintiff as to such old corporation, and the claim that it is suing the National Railways of Mexico administered by the Government, is recited in the order releasing the funds of the old corporation (fols. 57-59).

In the earlier proceedings, Hardin & Hess appeared for both defendants, characterizing their

appearance as "special", apparently recognizing that the National Railways of Mexico, Government Administration, was the defendant sued. The affidavit of Jerome S. Hess, of November 4th, 1922, states appearance on behalf of the defendants (fol. 146); the order of Mr. Justice Tompkins, extending time to November 28th on motion of Hardin & Hess, is "of the defendants" (fol. 145); the stipulation and order of extension to January 13th, 1923, shown to have been secured by Hardin & Hess is "of the defendants" (fol. 144); the petition for removal states service on Francis P. DeHoyos, as General Agent of the National Railways of Mexico, Government Administration, and although such petition purports to be only for the Government of the United States of Mexico, it is executed by Carlos R. Felix and Francisco P. DeHoyos (fols. 21 and 29).

The order to show cause upon which the order under review was secured, however, purports to be for the defendant, the Government of the United States of Mexico only, and the extension of time is procured for said defendant only (fol. 61-62). The defendant, National Railways of Mexico, Government Administration, is therefore now in default herein.

The plaintiff at every stage made clear that his transactions had been with the officials of the Government operation of the Mexican National Railways.

In Mr. Oliver's affidavit, verified February 13, 1923, he says: "That contracts upon which this action was brought were made with Francisco Perez, as Director General of the National Rail-

ways of Mexico and with other operating officials engaged in the Government Administration of the National Railways of Mexico, and that all of the transactions upon which this suit was brought were had with the National Railways of Mexico as administered by the Government" (fol. 87).

Judge Knox in his opinion takes cognizance of the claim of the plaintiff that the suit in part is based upon a contract entered into within the United States, and having to do with a railway system operated by such government through the medium of an administrative body (fol. 179).

The contention of the plaintiff is that the Government of the United States of Mexico is liable on his contracts, but he also sued the subordinate administrative body, as he is entitled to do under the practice of the State of New York, by virtue of Subdivision 213 of the Civil Practice Act, which is as follows:

> "*Where doubt exists as to who is liable.* Where the plaintiff is in doubt as to the person from whom he is entitled to redress, he may join two or more defendants, to the extent that the question as to which, if any, of the defendants is liable, and to what extent, may be determined as between the parties."

That attachment affidavit of Mr. Oliver (fol. 38), set forth that the Government of the United States of Mexico, had illegally placed an embargo upon the plaintiff's locomotives, and that in spite of the appeal to the Mexican Courts which had declared the embargo illegal and void, the Government refused to permit the removal of said

locomotives, and that the plaintiff elects to consider such acts as a sale of said locomotives.

The full record of the decisions referred to is not included in the record. The decision on appeal was that of the First Circuit Court of the Republic of Mexico, made May 6, 1922, in an action by the Public Ministry, in representation of the Mexican National Railways against the Oliver American Trading Company, on appeal against an interlocutory sentence delivered by the fourth supernumerary judge of the District, and affirmed the decision that the Public Ministry could not maintain action on the ground that the National Railways of Mexico did not belong to the Mexican Federation, but was considered as an ordinary company, and had a Board of Directors to which belonged all right of representation, and that the Federal Government could not exercise any domination; but that its functions must be in the character of a mere administration. It was in this action that the Public Ministry had obtained a precautionary embargo on locomotives as security to the suit.

It has not been easy to ascertain the precise legal status of the National Railways of Mexico, Government Administration, the affidavits of the defendants being confusing.

In the affidavit of Mr. DeHoyos, verified November 8, 1922 (fol. 41) he says:

> "I am the General Agent in New York for National Railways of Mexico (Government Administration), which is the title or name under which the Government of the United States of Mexico controls and operates its railway lines. I hold my office as such

> General Agent under and by appointment from the appropriate official of the Government of the United States of Mexico, of which Government I am an official."

Gunther R. Lessing, in an affidavit verified January 12, 1923 (fols. 71-72), states that he is employed as an attorney by the National Railways of Mexico, Government Administration, in the City of Mexico, and that the National Railways of Mexico is entirely operated, managed and controlled by the Government of Mexico itself, and that all persons having any relation with it are solely and exclusively employees of the Government, and have no relation or connection with the corporate entity known as the National Railways of Mexico; and that the said National Railways of Mexico, the corporation, ceased to function in connection with the operation, management and control of the company in 1914, when the same was taken over by President Carranza, by decree.

Mr. DeHoyos, in affidavit verified February 6, 1923, says (fol. 83):

> "That from the time that said railways were taken over by the Carranza Government in 1914, all of the property, funds and assets of the railways became the property of the Government of Mexico, and so continued; and said property has been operated, administered and financed since that time by the Government of the United States of Mexico, and that it uses the name 'National Railways of Mexico' with the designation thereafter 'Government Administration' merely for the purpose of convenience, and because such name aptly illustrates the fact

that the railways are now being operated by the Government for national purposes'' (fols. 83-84).

Jerome S. Hess, in affidavit of January 12, 1923, says that as appears by the attachment affidavit of the plaintiff, the National Railways of Mexico, Government Administration, is owned and operated and is the sole property of the Government of the United States of Mexico. In a subsequent affidavit, verified February 15, 1923, Gunther R. Lessing goes more fully into the relation of the National Railways (fols. 111-115), indicating that they were in effect requisitioned by virtue of Article 145 of the Federal Railway Law of Mexico and the Carranza decree of September 4, 1914. Mr. Lessing states that he was present and advised Mr. DeHoyos at the time the DeHoyos affidavit of February 6, 1923 was drafted, but that the statement therein that all the property, funds and assets of the railways became the property of the Government of Mexico, and so continued, was not intended to convey the impression that the capital assets of the Company, National Railways of Mexico, were taken over in 1914, and that the title to the same was acquired by the Government. He goes on to state that the franchise of the National Railways of Mexico, the corporation of 1908, was not seized, taken over or used by the Government of the United States of Mexico.

Upon this claim that the National Railways of Mexico, Government Administration, is not a corporate entity, and has not taken over the franchise of the old corporation, it is contended by the defendant that it is not a legal person for the purpose of suit.

The plaintiff's contract is in form with the National Railways of Mexico, y Anexos administered by the Government. It has long been the settled law that a subordinate political division or a state is a public corporation, and may sue or be sued as such. No particular mode of creation by statute or charter is necessary.

In *Wulfsohn* v. *The Russian Socialist Federated Soviet*, 118 Misc. 28, the question was whether an unrecognized foreign government was a foreign corporation within the Civil Practice Act of New York, Section 7, Subdivision 7. Judge Giegerich held that it was. He cites the provision of Section 7, Subdivision 7 of the Civil Practice Act, as follows:

> "A 'domestic corporation' is a corporation created by or under the laws of the state, or located in the state, and created by or under the laws of the United States, or by or pursuant to the laws in force in the colony of New York before the nineteenth day of April in the year seventeen hundred and seventy-five. Every other corporation is a 'foreign corporation'."

He cites the definition of public corporations from 14 *Corpus Juris*, 73, Corporations, as follows:

> "Such as are created by the people or the Government, State or Federal, for political or governmental purposes, such as the United States cities, towns, * * *"

and says:

> "It may therefore be assumed that the defendant is a foreign corporation within the meaning of Subdivision 7 of Section 7 of the Civil Practice Act."

The same position was taken in *Wulfsohn* v. *Russian Socialist Federated Soviet,* 202 App. Div. 421, 1922, in which Judge Rich says:

> "The United States has been referred to as a body politic and corporate (*Matter of Merriam,* 141 N. Y. 479)—a purely political or governmental corporation (*United States* v. *Perkins,* 163 U. S. 625, 631; 14 *C. J.* 73); the States of the Union have been held to be corporations which may sue (*Delafield* v. *State of Illinois,* 2 Hill 159; *State of Indiana* v. *Woram,* 6 *ib.* 33), and the defendant has been held to be a foreign corporation. (*Wulfsohn* v. *Russian Socialist Federated Soviet,* 118 Misc. Rep. 28).
>
> It has been settled (*Republic of Mexico* v. *De Arrangois,* 11 How. Pr. 1; affd. 5 Duer, 634) that a foreign government may maintain an action in the New York State courts *in the name of the State as an aggregate body,* and the modes of proceeding in cases of foreign corporations and of other States of the Union may be resorted to for the regulations of the practice. (*State of Yucatan* v. *Argumedo,* 92 Misc. Rep. 547.) It has been said of a recognized foreign government (*Republic of Honduras* v. *Soto,* 112 N. Y. 310) '*that such a being constitutes a legal entity,* capable of acquiring and enjoying property and protecting itself from injuries thereto in the courts of foreign countries, has long been recognized and established in the tribunals of civilized nations'."

The relation of the Transportes Maritimos Do Estado seems to have been substantially the same as regards the operation of the steamships concerned in the *Sao Vicente,* 260 U. S. 151, 1922, as that of the National Mexicon Railways in the

instant case. This was a Department of the Government of Portugal, in which judgments *in personam* with an attachment of the Steamer *Murmugao* appeared to have been sustained.

That the National Railways of Mexico, Government Administration is regularly transacting business within the Southern District of New Yorw, seems beyond dispute. The facts have been fully set forth earlier in this brief. Mr. DeHoyos describes himself as the General Agent in New York for the National Railways of Mexico, Government Administration (fol. 41). He returns a large amount of office furniture, used by him (fols. 105, 106) and while he states that no tickets for transportation are sold, nor contracts for carriage of freight made, nor bills of lading issued (fol. 84), he does not dispute the statements of Mr. Oliver (fol. 77), that there is an office at 233 Broadway, New York, described in the telephone book as General Agency with a separate telephone for the Purchasing Department, and that Mr. DeHoyos has about fifteen employees as such agent. This clearly constituted a doing of business within New York. *Rothenberg* v. *Western Pacific Railroad Co.*, 206 App. Div. 52 (4th Dept. 1923.)

In *Mitchell* v. *Banco de Londres y Mexico*, 192 App. Div. 1st Dept. 1920), the claim was made that a liquidator of a Mexican banking corporation, appointed by the chief executive officer of Mexico, was clothed with the immunity of the foreign government. It was held that a general creditor of the banking corporation suing on behalf of himself and other creditors similarly situated, could restrain the Mexican liquidator

from prosecuting an action to recover the moneys of such corporation deposited in a bank in this state. Greenbaum, *J.*, says:

> "The facts in this case show that Caturegli is the liquidator appointed under the laws of Mexico and may be regarded in the same light as a liquidator appointed under the Banking and Insurance Laws of this State. It is also to be borne in mind that the money in the Bank of Mexico is not the property of the sovereign government of Mexico. The circumstance that the receiver was appointed by the chief executive officer of Mexico under the peculiar laws of that country, instead of by a court of the Republic, does not make the government of Mexico an owner of the funds of the bank. If this proposition be sound, as I think it is, it follows that Caturegli, as liquidator, appointed under the laws of his government, having sought the jurisdiction of this court to collect from the Bank of Montreal the moneys on deposit belonging to the Bank of Mexico, stands in the same position as any other suitor. Having submitted himself voluntarily to the jurisdiction of our court, his rights become subject to a consideration of claims which other parties may have in the funds which are the subject-matter of the action."
>
> * * * *
>
> "It is clear, therefore, that this case does not fall within any of the provisions of international law which would prevent this court from exercising jurisdiction over the the defendant Caturegli. This question was considered in a leading case in England. In *Gladstone* v. *Mururus Bey* (1 H. & M. 495, 503) the court said: 'It appears to me that the bank will be amply protected, because, if

> the Turkish Ambassador should present his cheque, the Bank, under the order of this Court, would decline to honour it; and the only mode in which the Ambassador could compel payment, would be by taking some proceedings of his own. I feel a very strong opinion, that, if he chose to take that course, the position of things would be entirely altered. He would be submitting himself to the jurisdiction of our tribunals; and in that case English tribunals would have the power of saying, for that purpose only that they would administer justice between all parties concerned, in a litigation which he had himself commenced.' To the same effect is *Republic of Mexico* v. *Arrangois* (3 Abb. Pr. 470)."

That a public corporation, created by a state, does not constitute a separate sovereignty, is stated in *Halleck on International Law*, 71, as follows:

> "Hence, any public or private corporation, created by and deriving its authority from a state, cannot of itself constitute a separate and independent sovereignty."

In *Manning* v. *The State of Nicaragua and the Accessory Transit Company*, 14 Howard's Practice 517, (1857) the demurrer of the transit company on the ground that a sovereign could not be sued, was overruled for the reason that it could not be ascertained until the hearing whether the final adjudication could properly be made without the appearance of the foreign state. Clarke, *J.*, says:

> "But, cannot a state be made a defendant in an action, for the purpose of giving it an

opportunity to appear, and thus to enable a court to decide more intelligently and equitably, in relation to demands which are sought to be enforced against other defendants? There is nothing necessarily derogatory to the character or independence of a state, to be mentioned merely as defendants, conjointly with others in an action. The joinder may amount to nothing more than an invitation to appear by their representatives or agents; and it may be their desire to accept the invitation, if they consider that their appearance would be conducive to justice or to their own interests."

* * * *

"If then, the mere joinder of a state in a civil action, is no derogation from its dignity, or infringement of its sovereignty, the action is not on that account, necessarily and inevitably untenable; and a demurrer to the complaint on that ground cannot be maintained."

In the case of the territorial sovereign, it is held in *United States* v. *Lee, supra,* that the doctrine that the state cannot be sued is not applicable to officers holding property for public uses.

In *Sharps Rifle Manufacturing Company* v. *Rowan, supra,* it was held that an action to compel the conveyance of real estate was maintainable, title standing in the name of an agent of the British Government.

In the *Sloan Ship Yards Corporation* v. *United States Shipping Board Emergency Fleet Corporation,* 258 U. S. 549 (1922), it was held that although the United States owned all stock of the Fleet Corporation, the latter, in spite of possessing wide powers, was not immune from suit. Holmes, *J.*, says:

> "But such a motion is a very dangerous departure from one of the first principles of our system of law. The sovereign, properly so called, is superior to suit for reasons that have often been explained. But the general rule is that any person within the jurisdiction always is amenable to the law."

To the same effect is *Manufacturers' Land and Improvement Company* v. *United States Shipping Board Emergency Fleet Corporation*, 284 Fed. 231 (1922).

The plaintiff maintains that the Government of the United States of Mexico was itself responsible and may be sued upon the contracts entered into in the name of the National Railways of Mexico, Government Administration, but if, for any reason, this is not the case, then such railway administration constitutes a suable body.

POINT VIII.

The judgment should be reversed with costs to the plaintiff-in-error.

Respectfully submitted,

ROBERT F. GREACEN,
ALFRED HAYES,
Counsel for Plaintiff-in-Error.

WM. R. STA

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1923.

No. 662.

THE OLIVER AMERICAN TRADING COMPANY, INC.,
Plaintiff-in-Error,

against

THE GOVERNMENT OF THE UNITED STATES OF MEXICO AND NATIONAL RAILWAYS OF MEXICO,
Defendants-in-Error.

BRIEF OF THE DEFENDANT-IN-ERROR.

JEROME S. HESS,
HAROLD B. ELGAR,
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GEORGE F. SNYDER,
Of Counsel.

CHARLES WATSON RUSSELL, Printer

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Supreme Court of the United States

OCTOBER TERM 1923

THE OLIVER AMERICAN TRADING COMPANY, INC., Plaintiff-in-Error, AGAINST THE GOVERNMENT OF THE UNITED STATES OF MEXICO AND NATIONAL RAILWAYS OF MEXICO, Defendants-in-Error.	No. 662.

BRIEF OF THE DEFENDANT-IN-ERROR.

FACTS.

The Action.

This is an action *in personam* brought against the United States of Mexico in which plaintiff-in-error claims "damages for the breach of several express and implied contracts" (fol. 33). The action was originally brought in the Supreme Court of New York State, Rockland County. The United States of Mexico made timely assertion in the state court of its claim to sovereign immunity (fol. 138) but before the motion was heard the suit was removed to the Federal Court for the Southern District of New York.

After removal, the United States of Mexico, protesting to the jurisdiction of the United States District Court and appearing specially by its attorneys, applied for and procured from the Hon. John C. Knox (fols. 61-62) an order to show cause why this suit should not be dismissed upon the ground that the defendant-in-error was "an independent, foreign sovereign nation * * * immune from process of the courts except upon its consent." The United States of Mexico on this application claimed that the National Railways of Mexico, Government Administration, were part of the National Government of Mexico (fols. 71-72, 83-85, 111-115).

Upon the argument of this motion the Assistant United States Attorney for the Southern District of New York, at the instance of the Mexican Government, made the following statement upon the authority of the Department of State:

> "The Government of the United States has at present no official relations with the administration now functioning in Mexico. This fact, however, does not affect the recognition of the Mexican state itself which for years has been recognized by the United States as an 'international person' as that term is understood in international practice. The existing situation simply is that there is no official intercourse between the two states."

On August 31, 1923, while the motion was pending, formal recognition of the Government of the United States of Mexico was accorded by the American Department of State (fol. 182). The relief sought was fully granted by the District Court in an order dismissing the case (fol. 1), which order sustained the Mexican Govern-

ment's contention and recited that it appeared to the Court that "said National Railways of Mexico is the direct operation of the Government of the United States of Mexico of a system of railways and is part of said Government" (fol. 3). The learned judge below states in the Certificate of Question of Jurisdiction (fol. 183) that he sustained the motion of defendant "to vacate the warrant of attachment herein and to dismiss the suit * * * *upon the concession that National Railways of Mexico are operated and controlled by the Government of the United States of Mexico,* * * * on the sole ground, etc."

The Attachment.

An attachment was issued by the State Court and levies thereunder made upon:

(1) The Consulate General of Mexico in New York City (fols. 89, 92).

(2) The Financial Agency of Mexico in New York City (fols. 21, 92).

(3) The Ferrocarriles Nacionales de Mexico y Anexos (Administracion del Gobierno)—National Railways of Mexico and Annexes, Government Administration (fols. 21, 92).

(4) Various depositaries of funds of the Mexican Government in the City of New York, such as banks and trust companies (brief of plaintiff-in-error, p. 96).

(5) Various oil companies situated in the City of New York owing export taxes to the

Government of Mexico (brief of plaintiff-in-error, p. 96).

(6) Upon the depositary of the funds relating to the Debt Agreement between the International Bankers and Mexico (brief of plaintiff-in-error, p. 96).

Argument on the Facts.

No complaint has been served. The affidavit of Oliver, the president of plaintiff-in-error corporation (fol. 30), sets forth the cause of action and states that (fol. 31) "Prior to 1914 defendant, National Railways of Mexico, owned and operated various railway lines *within the territorial limits of the Republic of Mexico*" (fol. 32). "On or about December 4, 1914, * * *" President Carranza "issued a decree wherein and whereby * * * he seized and took over all the property of defendant National Railways of Mexico and the administration thereof" and that "his government, through its officers and agents, was in actual possession of the property of said defendant railways, and carried on the administration and operation thereof"; that later the Government of President Obregon "took into its possession the property of defendant railways and continued the operation and administration thereof. Such possession, operation, and administration by Obregon's said government has continued to the present time. * * * The entire business of defendant railways was and is transacted by the said government, its officers and agents." Plaintiff-in-error then states in a vague and loose manner (fols. 33-38) the acts of

the Government of Mexico which the plaintiff-in-error claims were wrongful and by which it was damaged. All these acts (fols. 34-38) occurred in Mexico; and the opinion of Judge Knox below states "Here the alleged breaches of plaintiff's contracts occurred in Mexico * * *" (fol. 180).

The plaintiff-in-error has instituted *a plenary suit directly against a foreign independent sovereign in our courts for acts committed by that sovereign in its own territory,* the Republic of Mexico, and in said suit has sought to attach all of the foreign sovereign's property and funds of every kind, nature and description, debts owed to the foreign sovereign, its bank accounts, and even claims to have levied upon "more than eight million dollars claimed to be held for purposes of the so-called debt agreement" (brief, plaintiff-in-error, p. 96). Such an attempt in our courts against a foreign sovereign seems unbelievable yet that is the state of facts presented upon this appeal. A brief history of this litigation will show how this astonishing situation developed.

Plaintiff-in-error brought its suit in the Supreme Court of the State of New York upon the theory, as stated in its brief below, "that a non-recognized government was a foreign corporation within the meaning of Subdivision 7, Section 7 of the Civil Practice Act of New York", so that Mexico, unrecognized by the United States up to that time, came within this rule. The brief, to sustain this proposition quoted certain decisions of the courts of the State of New York, particularly its Appellate Division:

Wulfsohn v. *Russian Socialist Federated Soviet Republic*, 118 Misc. 28.
Same v. *Same*, 202 A. D. 421.

About ten days before the defendant-in-error made its motion in the court below to dismiss this action, the Court of Appeals of the State of New York reversed *Wulfsohn* v. *Russian Socialist Federated Soviet Republic,* 202 A. D. 421, and held that the Russian Government was immune from suit, 234 N. Y. 372, 138 N. E. 24 (1923). On August 31, 1923, while the motion to dismiss was still pending undetermined in the court below, the United States Department of State announced that Mexico and the United States "have resolved to renew diplomatic relations between them" and on September 3rd a Charge d'Affaires *ad interim* was formally accredited to each country (fol. 176). The decision of the Court of Appeals of the State of New York in *Wulfsohn* v. *Russian S. F. S. Republic, supra,* put an end to the theory upon which the action was commenced in the state court, to which we will refer more at length later; and the recognition of the United States effectually disposed of all matters remaining undetermined in the Federal court.

POINT I.

No appeal lies from the District Court to the Supreme Court in this case as the case below did not present the question of the jurisdiction of the District Court as a Federal Court under Section 238 of the Judicial Code.

The case is before this Court on writ of error to the District Court under Section 238 of the Judicial Code (36 Stat. L. 1157, as amended by 38 Stat. L. 804), providing "Appeals and writs of error may be taken from the District Court * * * direct to the Supreme Court in the following cases: In any case in which the jurisdiction of the court is in issue in which case the question of jurisdcition alone shall be certified to the Supreme Court from the court below for decision * * *." The language in the former Act of March 3, 1891, ch. 517, 26 Stat. L. 826, referred to in the decisions cited below is almost identical.

The certificate of the court below (fol. 183) states that the motion of defendant-in-error to vacate the warrant of attachment and to dismiss the suit "upon the ground that the Government of the United States of Mexico is an independent foreign sovereign nation and is, therefore, immune from process of the courts except upon its consent," is sustained upon "the sole ground that the defendant, The Government of the United States of Mexico, has been duly recognized by the United States of America, and diplomatic relations between the two countries have been resumed. The Government of the United States of Mexico is therefore under the law of nations and principles of comity, entitled to im-

munity from suit in the courts of the United States of America, unless upon its own consent, which, in this instance, has not been given.

"For such reason, it has been ordered that the Court will not further exercise jurisdiction herein, and that this action shall stand dismissed and that the attachment heretofore granted be vacated and any levy thereunder be vacated and set aside."

It is submitted that writ of error does not lie to this Court in this instance since *the "jurisdiction of the court" below, as a Federal court, was not "in issue."* It is firmly established by a long line of decisions that appeals and writs of error under the earlier Act of 1891, and under the present Section 238, lie to the Supreme Court *solely* when the case as presented in the District or in the old Circuit Court involved the jurisdiction of such court as a Federal court, as distinct from the jurisdiction of that court as a general court of law or equity.

Courtney v. *Pradt*, 196 U. S. 88, 49 L. ed. 398. Here it was held that the dismissal by the Circuit Court of a suit against a foreign executor for the want of jurisdiction in the state court from which it had been removed for diversity of citizenship does not present a question of the jurisdiction of the Circuit Court as a Federal court which will authorize a direct appeal to the United States Supreme Court.

> "It appears from the opinions of the circuit court, to which we properly may refer (*Loeb* v. *Columbia Twp.*, 179 U. S. 472, 45 L. ed. 280, 21 Sup. Ct. Rep. 174), that the court held that the state court had no juris-

diction so far as William C. Atwater was concerned unless it had jurisdiction as against the foreign executor of his deceased partner; that the suit must be treated as if against the foreign executor alone; and that it could not be maintained against the foreign executor in the state court, nor in the Federal court. And further, that the court was not bound to remand the case that the state court might determine that question" (p. 91).

* * * *

"It is settled that the question of jurisdiction thus to be certified is the jurisdiction of the circuit court as a court of the United States, and not in respect of its general authority as a judicial tribunal. *Blythe* v. *Hinckley*, 173 U. S. 501, 43 L. ed. 783, 19 Sup. Ct. Rep. 497; *Mexican C. R. Co.* v. *Eckman*, 187 U. S. 429, 47 L. ed. 245, 23 Sup. Ct. Rep. 211; *Louisville Trust Co.* v. *Knott*, 191 U. S. 225, 48 L. ed. 159, 24 Sup. Ct. Rep. 119; *Bache* v. *Hunt*, 193 U. S. 523, 48 L. ed. 774, 24 Sup. Ct. Rep. 547" (p. 91).

Kansas City Northwestern Railroad Company v. *Zimmerman*, 210 U. S. 336, 52 L. ed. 1084.

"It is enough, however, that the ground on which the jurisdiction of the circuit court was denied did not go to its jurisdiction as a Federal court. *Louisville Trust Co.* v. *Knott*, 191 U. S. 225, 48 L. ed. 159, 24 Sup. Ct. Rep. 119. The certificate does not purport to enlarge the record, but simply to state what was in issue. The record shows that the jurisdiction of the circuit court was denied on the single ground that the state court where the proceedings started had none. Whether that contention was correct or not under *Wabash R. Co.* v. *Adelbert College*,

208 U. S. 38, ante, 379, 28 Sup. Ct. Rep. 182, it had nothing to do with the jurisdiction of the Federal court as such, or, indeed, at all, except for the reason that *the power of a secondary tribunal can go no higher than its source*" (p. 338, italics ours).

Bogart v. *Southern Pacific Company*, 228 U. S. 137, 57 L. ed. 768.

This was a direct appeal from the old Circuit Court in a case which had been removed to that court from the state court for diversity of citizenship. The decree dismissed the suit as a result of applying the general rule as to indispensable parties. It was held that no question of jurisdiction of the court as a Federal court under Section 5 of the Circuit Court of Appeals Act was involved, the Court saying, by Mr. Justice Day:

"The question intended to be thus brought to this court by direct appeal is well settled to be the jurisdiction of the court as a Federal court. Questions of general jurisdiction, applicable as well to state as Federal tribunals, are not included in such review. *Louisville Trust Co.* v. *Knott*, 191 U. S. 225, 48 L. ed. 159, 24 Sup. Ct. Rep. 119; *Courtney* v. *Pradt*, 196 U. S. 89, 49 L. ed. 398, 25 Sup. Ct. Rep. 208; *Fore River Shipbuilding Co.* v. *Hagg*, 219 U. S. 175, 55 L. ed. 163, 31 Sup. Ct. Rep. 185.

The question cannot be brought into the record by certificate if not really presented, and whether so presented this court will determine for itself. *R. J. Darnell* v. *Illinois C. R. Co.*, 225 U. S. 243, 56 L. ed. 1072, 32 Sup. Ct. Rep. 760.

The question to be decided is whether the case was dismissed for the want of jurisdiction in the circuit court as a Federal court;

for if it be found that the case was dismissed because of the decision of a question not peculiar to the Federal jurisdiction, and involving only a general question of procedure in equity, this court need not consider it. From what has been stated it is apparent that the case was duly removed because of diverse citizenship, and what was done afterwards was in pursuance of the jurisdiction thus acquired. The defendants, the Southern Pacific Company, Olcott, and the railroad company, by plea claimed that the cause should not proceed because the railway company was an indispensable party to the suit. This, it is contended, presented a question of the jurisdiction of the court as a Federal court, and the dismissal of the suit was the denial of such jurisdiction" (pp. 144-145).

* * * *

"What the court really did in the present case was, first, to entertain jurisdiction of the suit upon the removal; and then, applying the general principal that a suit cannot be proceeded with in the absence of an indispensable party, to dismiss it because the railway company was an indispensable party to the present suit, and had not been served, and had not appeared or waived service, as would have been the requirement in any court of equity reaching the same conclusion. * * *

"We therefore are of the opinion that in no aspect in which the jurisdictional question was presented to this court is it reviewable by a direct appeal to this court from the circuit court. The present appeal is therefor dismissed" (pp. 147-148).

Geneva Furniture Mfg. Co. v. *Karpen & Brothers*, 238 U. S. 254, 59 L .ed., 1295. After

holding that the decree of the District Court dismissing the suit for want of jurisdiction should be reversed, the Court held as to the other portions of the bill that no jurisdictional question was involved, because the particular point was the jurisdiction of the court over a non-resident defendant which had been sued without its consent and without service on it.

> "The causes of action which they present —those not founded upon an unauthorized making, using, or selling of devices embodying the inventions of the plaintiff's patents, but resting only upon a breach of contractual obligations—do not arise under the patent laws" (p. 259). * * *
>
> "As to them no Federal court can take jurisdiction of a suit against the West Virginia company without its consent, save in the district of its residence or that of the plaintiff (Judicial Code, Sect. 51); and it hardly needs statement that the jurisdiction as limited and fixed by Congress cannot be enlarged or extended by uniting in a single suit causes of action of which the court is without jurisdiction with one of which it has jurisdiction" (p. 259).
>
> "It is not a question of Federal jurisdiction within the meaning of Sect. 238, but only one of general equity jurisdiction and practice applicable as well to state as to Federal courts. *Bogart* v. *Southern P. Co.*, 228 U. S. 137, 57 L. ed. 768, 33 Sup. Ct. Rep 497, and cases cited" (p. 260).

De Rees v. *Costaguta*, 254 U. S. 166, 65 L. ed. 202. In this case some of the defendants were non-residents as to whom plaintiff had procured an order for service by publication. In the

District court in which the action was begun the non-resident defendants filed a special appearance for the purpose of setting aside the proceedings and this motion was granted, resulting in a dismissal of the bill by final decree and the question was taken to the Supreme Court under Section 238 of the Judicial Code by appeal. The Court, holding that the appeal must be dismissed for want of jurisdiction, said by Mr. Justice Day:

> "It is equally well settled that where the question of jurisdiction presented and decided turns upon questions of general law, determinable upon principles alike applicable to actions brought in other jurisdictions, the jurisdiction of the court as a Federal court is not presented in such wise as to authorize the jurisdictional appeal directly to this court; and the question must be decided as other questions are, by the usual course of appellate procedure, giving review in the circuit court of appeals. *Louisville Trust Co* v. *Knott*, 191 U. S. 225, 48 L. ed. 159, 24 Sup. Ct. Rep. 119; *Bache* v. *Hunt*, 193 U. S. 523, 48 L. ed. 774, 24 Sup. Ct. Rep. 547; *Fore River Shipbuilding Co.* v. *Hagg*, 219 U. S. 175, 55 L. ed. 163, 31 Sup. Ct. Rep. 185; *Scully* v. *Bird*, 209 U. S. 481, 485, 52 L. ed. 899, 901, 28 Sup. Ct. Rep. 597; *Bogart* v. *Southern P. Co.*, 228 U. S. 137, 57 L. ed. 768, 33 Sup. Ct. Rep. 197" (p. 173).

See also

Schunk v. *Moline, Milburn & Stoddart Co.*, 147 U. S. 500, 37 L. ed. 255.

United States v. *Congress Construction Co.*, 222 U. S. 199, 200, 56 L. ed. 163.

Keatley v. *Furey*, 226 U. S. 399, 57 L. ed. 273.
The Pesaro, 255 U. S. 216, 65 L. ed. 592.
The Carlo Poma, 255 U. S. 219, 65 L. ed. 594.

Plaintiff-in-error should have taken its appeal to the Circuit Court of Appeals; no writ of error lies to the Supreme Court.

The single jurisdictional question before the District Court here was whether it had or would assume jurisdiction over a foreign sovereign nation directly sued and named as defendant. The District Court declined to take jurisdiction, upon the ground that this defendant was immune from suit without its consent, and consequently that the Court had no jurisdiction over the person of the defendant or over the subject-matter of the action, and that, as such recognition related back to the commencement of the existence of the Mexican Government, the state court in which the action had originally been commenced had no jurisdiction. The question whether immunity will be accorded and if so under what circumstances is in no sense contingent upon the powers of the Federal courts as conferred by the Constitution and Acts of Congress. The principle or rule of according immunity from suit and process to a foreign sovereign is one of *general* application, in any court, state or Federal, American or British. The doctrine is not Federal, it is universal. It is recognized and applied in the state courts of this country as well as in the Federal courts. It is as firmly established, as fundamental, as in-

herent in the very conception of judicial power and the exercise thereof, as is the doctrine that no court, state or Federal, will assume jurisdiction of or render personal judgment in a suit *in personam* against a non-resident who has not been served in the jurisdiction or has not entered a voluntary appearance.

Judge Knox did not grant defendant-in-error's motion and dismiss the action because plaintiff-in-error had no standing in that court *as a Federal court*, but because plaintiff had no standing in *any court* in a suit against a foreign sovereign.

Plaintiff-in-error seeks to escape from this embarrassment by invoking (brief, pp. 14-29) the provisions of the Federal Constitution and Judicial Code extending the judicial power to controversies between citizens of a state and foreign states. It is submitted that the Constitution and the Acts of Congress are not to be interpreted as flying in the face of established general principles of international or municipal law, and that these provisions invoked by plaintiff-in-error mean nothing more than that the Federal courts *may* entertain such suits either when brought by a foreign state against a citizen of a state, or by a citizen against a foreign state in the event the court has jurisdiction both over the person of the defendant and over the subject-matter of the action, with the consent of the sovereign. These provisions were never intended to create a new *principle* of law but only to give the Federal courts, as courts of limited jurisdiction, *power* to entertain such actions when brought in accordance with law. They do not create or guarantee to a citizen any constitutional right, but

only define the powers of *Federal* courts in contrast to the powers of state courts. These provisions are political or organic dealing with the partition of powers between the states and the nation, and between the higher and lower Federal courts.

If the contention of plaintiff-in-error be sound that the dismissal of this action violates *his* rights because it flies in the face of the constitutional provision that the judicial power shall extend to controversies between citizens and a foreign state, then it must equally follow that every time a Federal court dismisses an action brought by a citizen of one state against a citizen of another state—the "diversity of citizenship" basis of Federal jurisdiction—the court thereby violates this same clause of the Constitution and of the Judicial Code. The argument comes to grief upon the rocks of its fundamental error, that these provisions of the Constitution and Acts of Congress *create* in the Federal courts jurisdiction over foreign states and *require* every Federal court before which such a claim is laid to proceed to hear the claim on the merits.

In *Schooner Exchange* v. *M'Faddon,* 7 Cranch 116, 7 L. ed. 287, Chief Justice Marshall held it was improper for the lower Federal court to assume jurisdiction of a libel *in rem,* brought by citizens of a state against a vessel owned by a "foreign state." The decision was placed, not upon the limitation of powers of the lower courts *as Federal courts,* but upon the general doctrine of judicial self-limitation applicable in any court to a suit against a foreign state. Did this Court in this celebrated case violate the rights of the

American citizens, libellants of the French vessel, by declining to take jurisdication and thus defeat the express provisions of Art. III, sect. 2 (1), of the Constitution extending the judicial power of Federal courts to such controversies? This is the contention of plaintiff-in-error. The statement of the contention refutes itself.

It is thus clear that no constitutional provision or right is involved or denied in the dismissal of the action. A citizen enjoys no constitutional right to compel a Federal court to adjudicate his claim against a foreign sovereign. The dismissal of this action on the necessary ground that the court had no jurisdiction over either the person or the subject-matter of the action did not put the "jurisdiction" of that court "in issue" *as a Federal court*, and consequently no writ of error lies to this Court under Sect. 238 of the Judicial Code.

POINT II.

Dismissal of the action below was not a denial of any right without due process of law in violation of the Fifth Amendment.

Plaintiff-in-error seeks to justify its right to appeal directly to this court by alleging the existence of a Constitutional question. In Point II of its brief (pp. 29-30) it claims that the decision of the District Court violated the Fifth Amendment and deprived it of its property without due process of law. The deprivation of property complained of is the denial of its alleged

property right of action flowing from the alleged violation of its right to peaceable enjoyment and use of its property in Mexico. Plaintiff-in-error does not assert that the alleged taking over of its property in Mexico by the Mexican State is *per se* a violation of any right guaranteed by our Constitution.

The notion that the refusal of a Federal judge to assume jurisdiction of a suit brought to enforce a claim based on acts of a foreign sovereign in its own territory is a deprivation of property right without due process of law is startling, but fallacious. The vice in the contention lies in the assumption that a citizen's claim for damages against a sovereign is a property right. The citizen has no *right of action*, no *right to enforce a remedy by legal process*, against a sovereign without the latter's consent.

> "A sovereign is exempt from suit not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." *Kawananako* v. *Polyblank*, 205 U. S. 349, 353, 51 L. ed. 834 (1907).

A plea by the sovereign of no consent is not a plea in confession and avoidance such as the plea of prescription for instance which, at least tacitly, admits the existence of a right to obtain redress by judicial process. The plea serves merely to call the court's attention to the absence of any right of action. The refusal of the District Court to entertain jurisdiction here points out to the

suitor that he has no right of action, and that "due process of law" requires presentation of his claim through the diplomatic channels of the executive branch of the government.

The decision merely says to the suitor: "You must go elsewhere to obtain redress for the alleged wrong this sovereign did you in taking over your property without satisfying you." It constantly happens that a court says to a plaintiff, in dismissing his action: "You have no right of action here because the non-resident defendant has not been served with process in this jurisdiction and has not consented to be sued here." This does not deprive plaintiff of a property right under the Fifth or Fourteenth Amendments; and no appeal lies to this Court from such decision. No court, Federal or state, American or British, allows a right of action against a foreign sovereign over its objection, so far as we have been able to find. By universal application of this rule of comity, the sovereign is immune from suit. Nor does our Constitution purport to give or guarantee a right of suit against the sovereign of the "foreign state." No such right of action exists or is recognized, and the application by the District Court in this case of this doctrine of immunity is but an application of the universal rule, not a denial of an existing right.

This contention of plaintiff-in-error is further unsound for the reason that whatever be his real or fancied grievance against defendant sovereign, the question of its existence, extent and enforcement is *not a justiciable question.* It is not a question for a court of law, Federal or state; it

is solely a question for the executive branch of the government. By the process of judicial self-limitation the court says to the suitor: "You may have been injured, as you claim, in some personal or property right; but the redress of your alleged wrong is not a matter for a court and judicial process, it is for some other branch of the government to consider and deal with."

The dismissal of this suit by Judge Knox is therefore no deprivation of a right without due process; for a claim, an *alleged* "right of action" against a friendly sovereign, is not a vested right, the refusal to enforce which is contrary to the Federal Constitution. Further, a claim against a foreign sovereign is non-justiciable in nature, at least without the consent of the sovereign. No provision of the Constitution has been violated, no Federal question is here involved, and no question of jurisdiction, in the Federal sense, is presented. No appeal lies to this Court from the decision below.

POINT III.

Irrespective of the character of the transaction out of which the cause of action arose, neither in the United States nor in England is an action in personam maintainable directly against the sovereign where the judgment for damages would be satisfied out of the national wealth.

Under Point III. of plaintiff-in-error's brief, it is stated, p. 32:

> "A brief historical review of the decided cases and authorities on international law seems necessary to show how very recently the doctrine of general immunity has arisen."

This statement is exceedingly ill-considered and inaccurate, in the light of the long list of English decisions commencing in 1710, which, under the heading "English Law," are cited in plaintiff-in-error's brief, pp. 32-48:

Mattueof, 10 Mod. 4 (1710).

Barbuit's Case, Cases Tempore Talbot, 281 (1737).

Heathfield v. *Chilton*, 4 Burr. 2015 (1767).

Duke of Brunswick v. *King of Hanover*, 6 Beav. 1 (1843), Affd. 2 H.L.C. 1 (1848).

De Haber v. *The Queen of Portugal*, 20 L.J.Q.B. 488 (1851).

Wadsworth v. *Queen of Spain*, 20 L.J.Q.B. 488 (1851).

Taylor v. *Best*, 14 C.B. 486, 23 C.B.N.S. 89 (1854).

Gladstone v. *Musurus Bey*, 1 H. & M. 495 (1862).
Lariviere v. *Morgan*, L.R. 7 Ch. App. 550; 7 H.L. 423 (1872).
The Charkieh, L.R. 4 A. & E. 59 (1873).
Vavasseur v. *Krupp*, L.R. 9 Ch. 351 (1878).
The Parlement Begle, L.R. 5 P.D. 197 (1880).
Queen v. *McLeod*, 8 Can. Sup. Ct. 1 (1882).
Parkinson v. *Potter*, L.R. 16 Q.B.D. 152 (1885).
Mighell v. *Sultan of Johore*, L.R. (1894), 1 Q.B. 149.
The Crimdon, 35 T.L.R. 81 (1918).
Porto Alexandre, L.R. (1920) Prob. 30.

Lariviere v. *Morgan, supra*, was reversed, 7 H.L. 423 (1873), and the doctrine of *The Charkieh, supra*, was overruled by *Parlement Belge, supra.*

In every one of the other cases cited, except three, the sovereign or his representative were held immune irrespective of the character of the transactions. These three cases were:

(1) *Taylor* v. *Best*, 14 C.B. 486, 23 C.B.N.S. 89 (1854). Jervis, *C. J.*, reiterated the immunity of the sovereign and his minister, saying:

> "If an ambassador or minister violate the character in which he is delegated to this country, by entering into commercial transactions, that raises a question between the country to which he is sent and the country from which he is sent; but he does not

> thereby lose any privilege to which he may be entitled, the privilege being a general privilege, and the limitation attached to the privilege by reason of trading being confined by the statute of Anne to the case of servants of the ambassador,—who may lose the privilege" (p. 93).

The court held, however, that M. Drouet, having solicited service of the suit upon himself and having appeared in the action, had waived his immunity at least to the extent of permitting the suit to proceed to judgment; and that M. Drouet could not restrain the proceeding in the case. "For aught that appears here, M. Drouet was sued only for the purpose of ascertaining the liability of others, he being a necessary party to the action."

(2) *Barbuit's Case*, Cases Temp. Talbot, 281, was decided in 1737 by the Lord Chancellor upon the ground that Barbuit did not have such a commission as made him a foreign minister.

(3) *Heathfield* v. *Chilton*, 4 Burr. 2015 (1767), was placed by Lord Mansfield on the ground that the servant was not employed by the Prince Bishop of Liege at the time of the suit.

The English cases and the English rule extend to the sovereign and his property the fullest measure of immunity. They are carefully reviewed, classified and discussed in *Briggs* v. *Light-Boats*, 93 Mass. 157. As we refer to that case later for the enunciation of the principles and doctrines of the American law, we only refer to it here as a citation to the Court of a

most detailed, complete and accurate statement of the English authorities down to 1865.

The Porto Alexandre, L.R. (1920) Prob. 30, enunciates the recent English doctrine. That was an *in rem* proceeding, involving the immunity of a requisitioned vessel, as distinguished from an action *in personam* directly against the sovereign, as the instant case. Nevertheless the court granted full immunity to the vessel for the claim of damages arising from a collision. A quotation from the opinion of Warrington, *L.J.*, in that case evidences the respect and consideration which the English courts give to the decision in *Briggs* v. *Light-Boats*, *supra*:

> "There is one passage in the judgment of Judge Brett, *L.J.*, in *The Parlement Belge*, 5 P.D. 213, in which he is expressing what he considers to be the result of the judgment in *Briggs* v. *Light-Boats*, 93 Mass. 157, an American case, of which he obviously approves and on which he founds his own conclusion. He says: 'The ground of that judgment is that the public property of a government in use for public purposes is beyond the jurisdiction of the courts of either its own or any other state, and that ships of war are beyond such jurisdiction, not because they are ships of war, but because they are public property. It puts all the movable public property of a state, which is in its possession for public purposes in the same category of immunity from jurisdiction as the person of a sovereign, or of an ambassador, or of ships of war, and exempts it from the jurisdiction of all courts for the same reason—viz., that the exercise of such jurisdiction is inconsistent with the independence of the sovereign authority of the state.' "

Also see

The Parlement Belge, L.R. 5 P.D. 197, 215-6 (1880). which has expressly overruled *The Charkieh,* L.R. 4 A. & E. 59.
Vavasseur v. *Krupp,* L.R. 9 Ch. Div. 351.
Mighell v. *Sultan of Johore,* L.R. (1894) 1 Q.B. 149.

Plaintiff-in-error says on p. 48 of its brief, speaking of English decisions:

> "* * * probably property employed by an ambassador in private trade or held by a sovereign in his private capacity has no immunity."

That statement is both incorrect and contrary to authority. Since *Barbuit's Case, supra,* (1737) an ambassador engaging in trade did not waive his immunity. The *Duke of Brunswick* v. *King of Hanover,* 6 Beav., 1, specifically held that the King of Hanover, living in England as a private citizen, was nevertheless entitled to immunity "in respect of any act done out of this realm"; and in *Mighell* v. *Sultan of Johore, supra,* the court held that transactions of a most private nature did not preclude the sovereign from asserting his immunity in respect to them.

American Law.

On p. 48 of plaintiff-in-error's brief this statement is made:

> "The criticism of distinguished judges applying a rule is very commonly the signal

> for an impending amelioration of its hardship either by statute, judicial decision or treaty provision, and should give pause to the Supreme Court of the United States, in which the question is entirely open, before it departs from the views uniformly expressed by the judges of that court during more than one hundred years of its existence."

We do not know what plaintiff-in-error means by this statement. We can not say what this question is, because nowhere is it disclosed. Whatever it may be, how can it be entirely open in the Supreme Court of the United States if for over one hundred years the judges of that court have been expressing themselves concerning it. If what plaintiff-in-error seeks to say is that the Supreme Court of the United States has, for a period of more than one hundred years, enunciated and proclaimed fully and completely in its decisions the principles and doctrines of sovereign immunity, we agree. But if the statement implies that the Supreme Court of the United States in the case at bar is passing upon the question of sovereign immunity for the first time, then the plaintiff-in-error is undiscerning.

The case at bar is an action *in personam* directed against the United States of Mexico to recover damages for acts committed by it in the Republic of Mexico. Process was served upon certain representatives of the Mexican Government in the United States and attachment levied upon all of the public property of that nation which the zealous efforts of plaintiff-in-error and its counsel could discover. If op-

posing counsel has been unable to find a case decided by this Court exactly involving this state of facts, it is because no litigant heretofore has had the presumptuous temerity to make such an attempt.

In *Briggs* v. *Light-Boats, supra,* Justice Gray of the Supreme Court of Massachusetts, referring to *Schooner Exchange* v. *M'Faddon, supra,* says:

> "Chief Justice Marshall assumed as an axiom of public law that 'an independent foreign sovereign cannot be sued'."

As the case of *Briggs* v. *Light-Boats* is regarded both in England and the United States as a classic exposition of the doctrine of sovereign immunity, no important decision since that case having omitted reference thereto, we respectfully ask the court to consider the opinion of Judge Gray as part of our brief. It is a correct and precise exposition of the American as well as the English doctrine of immunity and of the application of that doctrine in the practice of both countries. It should be observed that *Briggs* v. *Light-Boats* was an *in rem* proceeding to enforce a lien for labor and materials furnished in the construction of a vessel in the Commonwealth of Massachusetts. The immunity of the United States from suit in such a proceeding was held inviolate.

Plaintiff-in-error in its brief has sought to argue from the decision of a Federal district court, *The Pesaro,* 277 Fed. 473, that there is some analogy between that case and the state of facts and principles involved in the case at bar.

> *The Pesaro was a libel in rem against the S/S Pesaro in the admiralty court to enforce a claim for damages to a cargo shipped on*

the vessel from Genoa to New York, the damage occurring on the high seas. The vessel was within the territorial jurisdiction of the United States and of the district court. The case at bar is an action in personam brought against the sovereign directly in a court of general jurisdiction, not in an admiralty court, to recover damages for acts committed by the foreign sovereign in its own territory. The Pesaro is a precedent of admiralty law and expressly so limited by Judge Mack in his opinion; and the weight of authority, including that of the Circuit Court of Appeals of the same circuit, is overwhelmingly against this decision.

We will not argue for or against the correctness of the legal principles enunciated in the *Pesaro* case, since we are not concerned with admirality jurisdiction or its doctrine. Judge Knox who wrote the opinion below in the instant case carefully pointed out the distinction (fols. 179-180):

> "Also they would seem to dispose of plaintiff's further contention that there is no immunity for a foreign sovereign state, with respect to a contract entered into within the United States, and having to do with a railway system operated by such government through the medium of an administrative body (fol. 180). It is true that in some recent decisions of the Court there has been an intimation that when a foreign power engages in such enterprises, and in pursuance thereof sends its vessels into the ports of this country, such ships should be held to the same liabilities as attach to vessels privately owned. In these cases, however, the causes of action were maritime in nature and the ships themselves were within the jurisdiction where libels were filed against them.

> For this reason, the actions were *sua generis*. Here the alleged breaches of plaintiff's contracts occurred in Mexico and the cause of action falls within the prescription of the Supreme Court in the *Hernandez* case."

The distinction which Judge Knox draws between the admiralty cases, in which he is in agreement with Judge Mack, and the instant case is particularly important, since Judge Knox has indicated a leaning toward the reasoning of Judge Mack regarding sovereign immunity in *in rem* proceedings rather than toward that of his other associates in the Southern District of New York, as is shown by two unreported decisions of his:

> *Ex Parte, Hussein Lufti Bey,* an appeal from which was heard in this Court in 256 U. S. 616, 65 L. ed. 1122; and *Campbell & Stuart* v. *Gul Djemal,* an appeal from which was recently heard and decided by this Court, Feb. 18, 1924.

Judge Mack does not seek to attack the common law doctrine of the immunity of the sovereign from suit. On p. 474 he says:

> "The general principle of the immunity of a sovereign state from suit without its express consent is too deeply imbedded in our law to be up-rooted by judicial decision. See *Ex Parte in the Matter of the State of New York, Edward S. Walsh, Superintendent,* 256 U. S.—, 41 Sup. Ct. 588, 65 L. ed.—, U. S. Sup. Ct. June 1, 1921."

So he not only recognizes the clear principle of sovereign immunity and its application to the common law but says:

> "In dealing with admiralty causes, historical or theoretical conceptions peculiar to the common law *must not* be assumed to be a part of the maritime law of nations" (p. 475, italics ours).

In view of the decision of Mr. Justice Pitney in *Ex Parte: In the Matter of State of New York, No. 2*, 256 U. S. 503, 65 L. ed. 1063, it is difficult to see, when a foreign sovereign is involved, how this court can come to any different conclusions:

> "It does not now press for solution; for, aside from the obligations of international law, though upon principles somewhat akin, it is uniformly held in this country that even in the case of municipal corporations, which are not endowed with prerogatives of sovereignty to the same extent as the States by which they are created, yet because they exercise the powers of government for local purposes, their property and revenue necessary for the exercise of those powers are to be considered as part of the machinery of government exempt from seizure and sale under process against the city."

The doctrine contrary to the *Pesaro* case is enunciated in:

> *The Pampa*, 245 Fed. 137 (D. C. E. D. N. Y.).
> *The Maipo*, 252 Fed. 627 (D. C. S. D. N. Y.).
> *The Maipo*, 259 Fed. 367 (D. C. S. D. N. Y.).
> *The Carlo Poma*, 259 Fed. 369 (C.C.A. 2nd Cir.); Revd., 255 U. S. 219, 65 L. ed. 594.

POINT IV.

"Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves." Underhill v. Hernandez, **168 U. S. 250, 42 L. ed. 456.**

All of the acts alleged in the affidavit of Oliver (fol. 30 *seq.*) upon which a cause of action is claimed, occurred, as shown above, within the territory of the foreign sovereign, the Republic of Mexico. Further, on the 31st day of August, 1923, formal *de jure* recognition of the Republic of Mexico was accorded by the State Department of the United States. Under these circumstances, all questions involved on this appeal are disposed of by two recent decisions of this Court, *Oetjen* v. *Central Leather Company*, 246 U. S. 297, 66 L. ed. 726 (1918), and *Ricaud* v. *American Metal Company Limited*, 246 U. S. 304, 62 L. ed. 733 (1918).

Oetjen v. *Central Leather Company.* In this case there was involved the title to hides which were *within* the United States; the controversy was between persons situated within the United States, one of whom at least was a citizen of the United States; and the Republic of Mexico, whose acts were called into question in the case, was *not* a party to the suit nor was any claim made against her. Mr. Justice Clarke:

> "Since the transactions thus detailed and since the trial of this case in the lower courts, the Government of the United States

recognized the Government of Carranza as the *de facto* government of the Republic of Mexico on October 19, 1915, and as the *de jure* government on August 31, 1917. *Jones* v. *United States*, 137 U. S. 202; *Underhill* v. *Hernandez*, 168 U. S. 250" (p. 301).

The Court further said:

"We prefer to place our decision upon the application of three clearly settled principles of law to the facts of this case as we have stated them.

"The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—'the political'—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision. *United States* v. *Palmer*, 3 Wheat. 610; *Foster* v. *Neilson*, 2 Pet. 253, 307, 309; *Garcia* v. *Lee*, 12 Pet. 511, 517, 520; *Williams* v. *Suffolk Ins. Co.*, 13 Pet. 415, 420; *in re Cooper*, 143 U. S. 472, 499. It has been specifically decided that 'Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but is a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens and subjects of that government.' This principle has always been upheld by this court, and has been affirmed under a great variety of circumstances. *Jones* v. *United States*, 137 U. S. 202, 212.

"It is also the result of the interpretation by this court of the principles of international law that when a government which originates in revolution or revolt is recognized by the political department of our government as the *de jure* government of the

country in which it is established, such recognition is retroactive in effect and validates all the actions and conduct of the government so recognized from the commencement of its existence. *Williams* v. ***Bruffy,*** 96 U. S. 176, 186; *Underhill* v. *Hernandez,* 168 U. S. 250, 253. See *s.c.* 65 Fed. Rep. 577.

"To these principles we must add that: 'Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.' *Underhill* v. *Hernandez,* 168 U. S. 250, 253; *American Banana Co.* v. *United Fruit Co.,* 213 U. S. 347.

"Applying these principles of law to the case at bar, we have a duly commissioned military commander of what must be accepted as the legitimate government of Mexico, in the progress of a revolution, and when conducting active independent operations, seizing and selling in Mexico, as a military contribution, the property in controversy, at the time owned and in the possession of a citizen of Mexico, the assignor of the plaintiff-in-error. Plainly this was the action, in Mexico, of the legitimate Mexican government when dealing with a Mexican citizen, and, as we have seen, for the soundest reasons, and upon repeated decisions of this court such action is not subject to re-examination and modification by the courts of this country.

"***The principle that the conduct of one independent government cannot be successfully questioned in the courts of another is as applicable to a case involving the title to***

property brought within the custody of a court, such as we have here, as it was held to be to the cases cited, in which claims for damages were based upon acts done in a foreign country, for it rests at last upon the highest considerations of international comity and expediency. To permit the validity of the acts of one sovereign State to be re-examined and perhaps condemned by the courts of another would very certainly 'imperil the amicable relations between governments and vex the peace of nations.'

"It is not necessary to consider, as the New Jersey court did, the validity of the levy of the contribution made by the Mexican commanding general under rules of international law applicable to the situation, since the subject is not open to re-examination by this or any other American court.

"The remedy of the former owner, or of the purchaser from him, of the property in controversy, if either has any remedy, must be found in the courts of Mexico or through the diplomatic agencies of the political department of our Government. The judgments of the Court of Errors and Appeals of New Jersey must be affirmed" (pp. 302-304), (italics **ours**).

We ask the Court's indulgence for including in our brief so long an excerpt from the decision, but because of the similarity of the facts and the complete application of that authority to the case at bar, the citations and reasoning of the Court in that decision will suffice, we feel, for the argument of our brief.

In that case the Court refused to pass upon the question of title between persons actually within the jurisdiction of an American court because it felt bound to respect the acts of a foreign sovereign, although the acts of the

foreign sovereign were only collaterally called into question. How much more will the Court respect the acts of the foreign sovereign when they are directly questioned in a suit which seeks directly to implead the sovereign for acts done by it within its own territory! To hold otherwise here would be in effect to say that our courts will respect the acts of a foreign sovereign when the sovereign is *absent*, but when the sovereign is *present* these same acts will be treated with disrespect. Such an argument is *reductio ab absurdum*.

In the Court of Appeal of England in *Luther* v. *James Sagor*, 3 K.B. (1921) 532, one of the most famous international law decisions in England in recent years, the determination of the Lord Justices is made to depend upon *Underhill* v. *Hernandez* and *Oetjen* v. *Central Leather Company*. That was an action involving the title to certain ply wood, the plaintiff claiming title as the original owners of the ply wood in Russia where they had a factory, and the defendants, a firm in England, claiming through purchase from the Russian Commercial Delegation in London, acting in behalf of Soviet Russia. The ply wood was in England. In the lower court, plaintiff was awarded judgment for the reason that the English Government did not recognize the Russian Soviet Government as the government of a sovereign state or power. While the case was on appeal, *de facto* recognition was accorded to Soviet Russia and the judgment of the lower court was thereupon reversed. Three of the Lord Justices wrote opinions and each relied for his authority upon the three cases of

Williams v. *Bruffy*, 96 U. S. 176, 24 L. ed. 716.

Underhill v. *Hernandez*, 168 U. S. 250, 42 L. ed. 456.

Oetjen v. *Central Leather*, 246 U. S. 297, 62 L. ed. 726.

Warrington, *L. J.*:

"We have not been referred to, nor have I found any authority in English law on the point, but there are decisions of the Supreme Court of America directly supporting the view I have expressed."

Scrutton, *L. J.*:

"We were referred to decisions of the Supreme Court of the United States dealing with a similar state of facts: *Oetjen* v. *Central Leather Co.* (1); *Underhill* v. *Hernandez* (2); *Williams* v. *Bruffy* (3)."

Bankes, *L. J.*:

"Attention has been called to three cases decided in the Supreme Court of the United States: *Williams* v. *Bruffy* (1); *Underhill* v. *Hernandez* (2) and *Oetjen* v. *Central Leather Co.* (3)."

In *Hewitt* v. *Speyer*, 250 Fed. 367, C.C.A. 2nd Cir. (1918), Rogers, *J.*, said:

"From what has been stated, it is evident that the title of Speyer & Co. to the money herein involved is derived from the government of Ecuador and that the court cannot grant the relief invoked without sitting in judgment upon the sovereign acts of that nation. This very clearly it is not within the province of the court to do. These cases (*Underhill* v. *Hernandez*, 65 Fed. 577, affd. 168 U. S. 250, 42 L. Ed. 456) show that the plaintiff's claim cannot be adjudicated in an American court, because to

do so would make it necessary to pass on the right of the government of Ecuador to do what was done. And see *American Banana Co.* v. *United Fruit Co.* (C.C.), 160 Fed. 184, which was affirmed by this court in 166 Fed. 261, 92 C.C.A. 325, and by the Supreme Court in 213 U. S. 347, 29 Sup. Ct. 511, 53 L. Ed. 826, 16 Ann. Cas. 1047" (p. 370).

See also *State of Yucatan* v. *Argumedo*, 92 Misc. 547, 554 (N. Y., 1915).

POINT V.

Plaintiff, after it discovered that the National Railways of Mexico, a Mexican corporation incorporated March 28, 1908, was not concerned with the matters in suit, sought to make a virtue of necessity by claiming that the Government Administration of the national lines was a suable body.

The affidavit of Oliver (fols. 30-31) states):

"II. The defendant The Government of the United States of Mexico is and at all the times herein mentioned was a foreign corporation. It is a *de facto* government and has never been recognized by the United States of America. It has a place for the transaction of business within the State of New York in charge of a managing agent, and it now regularly transacts and for a long time heretofore it has regularly transacted business within this State. The defendant, (fol. 31), National Railways of Mexico, is and at all the times herein mentioned was a corporation organized and existing under and by virtue of the laws of the Republic of Mexico. Deponent cannot produce a certified copy of the Company's certificate of incorporation in proof of this allegation, for the reason that all the original documents con-

nected with its organization are in the possession of the defendant, The Government of the United States of Mexico, in Mexico City. Deponent, however, knows that the National Railways of Mexico is a Mexican corporation from his residence of many years in Mexico and his personal business dealings with the company also extending over a number of years. In Moody's Manual of Railroads and Corporation Securities, a work of recognized authority on the subject, the company is stated to have been 'incorporated in the City of Mexico, March 28, 1908, pursuant to a decree of the Federal Executive of Mexico, dated July 6, 1907, issued in accordance with a law of the Congress of Mexico, promulgated December 26, 1906.'

"III. Prior to 1914 defendant, National Railways of Mexico, owned and operated various railway lines within the territorial limits of the Republic of Mexico."

We submit that plaintiff-in-error could not have been more meticulous in identifying the entity which he made a defendant in this suit under the name of National Railways of Mexico. He then goes on to say (fols. 32, 33):

"On or about December 4, 1914, said Carranza issued a decree wherein and whereby, on behalf of the government or group represented by him, he seized and took over all the property of defendant National Railways of Mexico and the administration thereof. As he extended his power over Mexico he put his said decree into effect with the result that, at the time of his recognition by the United States of America, his government, through its officers and agents, was in actual possession of the property of said *defendant railways*, and carried on the administration and operation thereof."

The Court will note this last expression, that the government took over the property of said "defendant railways." Then he goes on to say:

> "The Government of Obregon, after the overthrow of Carranza's said Government, took into its possession the property of *defendant railways* and continued the operation and administration thereof. Such possession, operation and administration by Obregon's said government has continued to the present time. The name of the corporate (fol. 33) entity, National Railways of Mexico, was used by said government in the operation and administration of *defendant railways*, but said corporation was and is virtually without property, insolvent and unable to transact business. The entire business of *defendant railways* was and is transacted by the said government, its officers and agents.
>
> "IV. Plaintiff has certain claims, demands and causes of action against the above named defendants and each of them for the recovery of a sum of money only as damages for the breach of several express and implied contracts, other than contracts to marry, and the said claims, demands and causes of action arise from and are based on the following facts:"

This language requires no interpretation or rule of construction to convey its meaning. The two defendants are:

(1) the corporation National Railways of Mexico, which "corporation was and is virtually without property, insolvent and unable to transact business. The entire business of defendant railways was and is

transacted by the said government, its officers and agents" (fol. 33); and

(2) the Government of Mexico.

The "said government" of course is the defendant Government. The plaintiff-in-error alleged and conceded by its own statement that the defendant railways were supine and inactive and that the Government was actively carrying on the railway business. Under these circumstances, the claim which plaintiff-in-error later asserted, that the defendant railways upon which it intended to serve process were the Government Administration because Mr. de Hoyos was served, is a complete contradiction of the statement contained in his affidavit, verified October 17, 1922 (fol. 33). How could plaintiff-in-error in good faith claim that the National Railways which it intended to sue was an active organization actually operating the railways when it had expressly and concisely characterized the defendant which was a party to the action as being "insolvent and unable to transact business." Plaintiff-in-error in its affidavit of January 23, 1923 (fols. 77, 78) tried to give the impression that because of serving Mr. de Hoyos it was serving the Railway Administration and not the corporation. The answer to that is that whomever it so served with process it intended to serve as officers or agents of the corporation which it had made a party to the suit, and *that* corporation was not an active corporation but was one which was unable to transact business.

We are not concerned with the motive of plaintiff-in-error in joining National Railways of

Mexico, the corporation. Plaintiff-in-error was untrammelled, save by its own conscience, in joining whomever it chose as a defendant in the suit. This act of suing the National Railways of Mexico, the corporation, was so real that the Sheriff of New York County levied upon the funds of the corporation, National Railways of Mexico; and the National City Bank, under date of November 28, 1922, stated in a letter to the Sheriff of New York County (fol. 108):

> "We hereby certify that there was in our possession when the said warrant was served the sum of $39,723.53 in an account entitled 'National Railways of Mexico, Ferrocarriles Nacionales de Mexico.'
>
> "The said sum above mentioned is the property of Ferrocarriles Nacionales de Mexico, a Mexican Corporation.
>
> "Yours very truly,
>
> "W. L. Sharing,
> "Assistant Vice-President."

Plaintiff-in-error, when it learned of the attachment of the funds of the corporation, reiterated its position that the corporation, National Railways of Mexico, was the defendant in the action (fols. 77-78):

> "In addition to the foregoing office in control of the said de Hoyos, there is in the City of New York an office of the National Railways of Mexico at No. 25 Broad Street, which is the office of the corporate entity in this country. The corporate entity in this country is only maintained practically for the purpose of preserving its legal status, (fol. 78) but the assets of the corporation are in possession of the Mexican Government

in Mexico and that government is in actual control of the corporation and operates the same as the National Railways of Mexico (administered by the government). I am unable to state the legal effect of such operation, and accordingly I have served the agent of the Mexican Government who represents the administration which is running the railroad. Whether or not such operation is binding upon the legal shell that is here in New York is not known at this time, but pursuant to Section 233 of the Civil Practice Act of the State of New York, the railroad corporation has been made a party-defendant through Mr. de Hoyos."

Could a statement be more precise than: "pursuant to Section 233 of the Civil Practice Act of the State of New York, the railroad corporation has been made a party-defendant through Mr. de Hoyos"? (fol. 78). The plaintiff-in-error wanted to sue the National Railways of Mexico, the corporation, just as it states, but instead of effecting service on that corporation by serving one of its officers, it found that the attempt to serve that company was abortive because it had served a man who was unconnected with the defendant corporation, Mr. de Hoyos, but who *happened* to be a Government employee of the Government Administration of the Mexican National Railways.

Section 233 of the Civil Practice Act of New York States allows a party to join a tentative defendant. It certainly does not permit joining an accidental one.

A motion was made returnable on the 19th day of January, 1923, by the attorneys for the

corporation, National Railways of Mexico, to vacate the order of attachment on this fund in the National City Bank, plaintiff-in-error having stated (Opinion, Knox, *J.*, fol. 53):

> "that National Railways of Mexico, a corporate entity, 'incorporated in the City of Mexico, March 28, 1908,' is not one of the defendants whose property was sought by the attachment issued in the State Court."

The motion of the attorneys, Messrs. Van Vorst, Marshall & Smith, for the corporation, National Railways of Mexico, was granted and an order entered April 20, 1923, releasing said funds.

We stress the facts of this situation because plaintiff-in-error's brief at times vaguely suggests, and at others assumes as a fact, that there exists some corporate body which neither the eye can see nor the mind grasp, hovering over this record like a dark and brooding spectre.

We emphasize these facts:

NOT to raise in this Court any technical question of service of process,

BUT to establish out of plaintiff-in-error's mouth the fact that it not only knew there existed no such thing as a "governmental administrative body in the nature of a public corporation" (plaintiff-in-error's brief, p. 137) running the Railways of Mexico, but also that these Railways were "the direct operation by the government of the United States of Mexico of a system of railways and is a part of said Government" (fol. 3).

What prompted plaintiff-in-error to claim there was some "governmental administrative body in the nature of a public corporation" involved in these transactions is obvious.

(1) Subsequent to the bringing of this action, the Court of Appeals of the State of New York, in *Wulfsohn* v. *Russian S. F. S. Republic, supra,* reversed the decisions of the lower courts of the state and held that an unrecognized government was *immune* from suit. This decision had a two-fold bearing upon the motion of defendant-in-error to dismiss the proceedings:

(a) In relation to POINT VI of this brief, raising the question as to absence of jurisdiction of the state court and consequently of the lack of jurisdiction of the District Court on removal proceedings; and

(*b*) The Federal court would have an additional authority in the decision of the highest court of the State of New York for sustaining the motion.

(2) When it became apparent that the corporation, National Railways of Mexico, which was so accurately described as the defendant in the proceedings, bore no legal or actual relationship to the transactions with which the plaintiff-in-error was concerned, plaintiff-in-error was obliged to cast about for something which it could point to as being suable.

Relying exclusively upon the statements contained in the affidavits of the president of

plaintiff-in-error, we submit that by its words and acts it has conclusively demonstrated, without reference to the affidavits of defendant-in-error, that, as stated in the order of Judge Knox dismissing this case, "said National Railways of Mexico is the direct operation by the Government of the United States of Mexico of a system of railways and is part of said government." There is no claim by the plaintiff-in-error, either in this court or in the court below, that any dispute exists as to the manner of operation of the Railways by the Government of Mexico.

NATIONAL RAILWAYS OF MEXICO AND ANNEXES, ADMINISTRATION BY THE GOVERNMENT, IS THE "DIRECT OPERATION BY THE GOVERNMENT OF THE UNITED STATES OF MEXICO OF A SYSTEM OF RAILWAYS AND IS PART OF SAID GOVERNMENT."

Oliver says in his affidavit (fol. 32) that on December 4, 1914, President Carranza issued a decree whereby "his government through its officers and agents, was in actual possession of the property of said defendant railways and carried on the administration and operation thereof." In his affidavit verified the 23rd day of January, 1923 (fol. 78), Oliver speaks of Mr. de Hoyos, the person served with the summons, as "an employee of the Government of Mexico." No affidavit submitted by the plaintiff-in-error in opposition to the motion for the dismissal of this suit has alleged or even suggested the existence of a governmental administrative body, or the constituency thereof, or of a public corporation; and nowhere is there any statement or allegation as to any board, administrative body,

separate governmental agency, subordinate political division or what-not.

All of the statements of fact as to the operation of the Railways which are pertinent to POINT VII. of plaintiff-in-error's brief are contained in the main affidavit of Oliver (fol. 30), to which reference has been made before. In spite of the conclusion in the head-note of POINT VII. (plaintiff-in-error's brief) as to there being a "governmental administrative body in the nature of a public corporation," nowhere has an attempt been made to support this by any reference to the record. We challenge the plaintiff-in-error to point to a single fact in the record to justify such a statement. The affidavit of Oliver (fol. 32) and the affidavit of Lessing (fol. 112), submitted by defendant-in-error are in accord that the Railways were taken over by the Government of Carranza pursuant to a decree. That decree is set out in full in the affidavit of Lessing (fol. 112); and the attention of the Court is called to the preamble wherein President Carranza states:

> "Whereas, the requirements of the present campaign and of the public services exact that this First Chieftaincy assume the direction, management and administration of all the railway lines * * *."

And to the Federal Railway Law under which such decree was made (fol. 113):

> "Art. 145. The Nation shall have the following rights:
>
> (fol. 113) X. The Federal authorities have the right to requisition in case the public

> interest of the nation so demands, all the railroads, its personnel and all its utilities, and to use same as they may deem convenient."

These show that the Railways were taken over for reasons of the highest public interest for national purposes. There is nothing else in the record in relation to the administration of these Railways and their manner of operation, other than is contained in this and another affidavit of Lessing (fols. 71, 72), the affidavit of de Hoyos (fol. 83), and the statement contained in the main affidavit of Oliver (fol. 30) and another (fol. 77). These show clearly the facts in regard to these railways:—they are operated directly for national purposes by the Government just as it operates the Post Office, Customs Service, War Department, or any other branch of the national government. They also conclusively show that the attempt to give to the court the impression that some "governmental administrative body in the nature of a public corporation" is somewhere in existence in the record before this tribunal is nothing more than a doubtful effort to bolster a precarious cause.

The identical situation in respect to the administration by the Mexican Government of these Railways was presented in *Mason* v. *Intercolonial Railway*, decided by the highest court of Massachusetts in 197 Mass. 349, 83 N. E. 876, 16 L.R.A.N.S., 276. Apparently the same attempt was made by the plaintiff in that case to argue that the defendant was a corporation; some sort of public corporation, we assume. The action was for personal injuries received by the plaintiff while a passenger on the Inter-

colonial Railway at Moncton, N. B. As in the instant case, there was an attachment of funds within the jurisdiction of Massachusetts; and the *amicus curiae,* who advised the court as to the state of facts repecting the Intercolonial Railway, set forth the exact contention and state of facts which we have stated under this point:

> "* * * that there exists no such body corporate as is described under the name and title of the Intercolonial Railway of Canada, as defendant in this action; and further, he respectfully suggests and shows to the court that the line of railway described in the writ and declaration in this action as the Intercolonial Railway of Canada is in fact the property of the British Crown and is owned and operated by His Britannic Majesty in the right of his government of Canada; * * * wherefore the said Arthur H. Russell respectfully suggests to the court that it is in derogation of the sovereignty and independence of His Britannic Majesty and contrary to the law and comity of nations that funds belonging to His Britannic Majesty should be withheld by a process of this court or that this court should take jurisdiction of this action, and he moves that the said action be forthwith dismissed."

Chief Justice Knowlton says in the course of his opinion:

> "The truth of the matters thus shown to the court is not questioned. It appears that no subject, private individual or corporation has any interest or concern by way of property or direction in the ownership or working of the Intercolonial Railway, but that it is owned and operated by the king, through his government of Canada, for the public purposes of Canada."

That case is a complete answer to the claim that the sovereign by engaging in trade waives his sovereign immunity. In the Massachusetts case the sovereign actually owned as well as operated the Railway, so that if any distinction as to the use of the property could be made as between that case and this, it is clearly evident there that the Railway was the permanent possession of the Crown; and from that it might be argued that of necessity it was devoted to commercial purposes, although those commercial purposes be considered for the national interest. In the case at bar, however, the attention of the court is respectfully called to fact that the National Railways of Mexico were taken over by the Government pursuant to the law cited *supra* which authorized such taking "in case the public interest of the nation so demands" (fol. 113). This court will assume that the necessity in fact existed which justified the sovereign in acting in accordance therewith. The Massachusetts court does not even discuss the question of waiver of the sovereign immunity and after an examination of the English and American authorities, particularly *Briggs* v. *Light-Boats* and *Schooner Exchange* v. *M'Fadden, supra*, states:

> "The principles which have long been recognized as applicable to the dealings of all nations with one another, as well as the formal decisions of the courts, make it plain that this action must be dismissed for want of jurisdiction."

To the same effect, see also

Queen v. *McLeod*, 8 Can. Sup. Ct. 1 (1882).

Under this Point plaintiff-in-error claims support in some authorities. The first is *Wulfsohn* v. *Russian S. F. S. Republic*, 118 Misc. 28 (N. Y.), which, as the brief states, involved the question, "whether an unrecognized foreign government was a foreign corporation within the Civil Practice Act of New York, etc." Plaintiff-in-error has chosen an extremely unfortunate precedent, since this decision, as counsel well knew, was expressly reversed by the Court of Appeals on Jan. 9, 1923, 234 N. Y. 372, *supra*. Even that part of the decision quoting the New York Civil Practice Act which states that "every other corporation is a foreign corporation" begs the question which is presented under Point VII of plaintiff-in-error's brief since there is no evidence whatsoever of the existence of any corporation other than the body politic, the United States of Mexico. The statement is then made that (p. 144, plaintiff-in-error's brief): "Transportes Maritimos Do Estado seems to have been substantially the same as regards the operation of the steamships concerned in the *Sao Vicente*, 260 U. S. 151 (1922), as that of the National Mexican Railways in the instant case." This is a wholly unwarranted statement as there is no evidence before the court of the existence of an independent corporate body; and, furthermore, the *Sao Vicente* (*supra*) was decided in the United States Supreme Court upon an entirely different ground and in the Circuit Court of Appeals, 281 Fed. 111, upon the ground that the sovereign had waived his immunity.

Mitchell v. *Banco de Londres y Mexico*, 192 A. D. 720 (N. Y.), in which we were counsel, in-

volved the status of a legal commission, appointed in Mexico under the banking laws of Mexico and a decree of the Executive, a corporate body actually being created by that legislation and decree. No similar body appears in the record of these proceedings.

Manning v. *State of Nicaragua and the Accessory Transit Company,* 14 How. Pr. 517 (N. Y.) was an action against the State of Nicaragua itself in which the court held expressly that the sovereign could not be sued unless it waived its immunity. There was no inferior or representative body involved.

United States v. *Lee,* 106 U. S. 196, 27 L. ed. 171, and *Sharps Rifle Manufacturing Company* v. *Rowan,* 34 Conn. 329, were suits against individuals. Neither the sovereigns directly nor any artificial body were before the courts.

The *Sloan Ship Yards Corp.* v. *United States Shipping Board Emergency Fleet Corp.,* 258 U. S. 549, 66 L. ed. 762, and other cases involving the Shipping Board could not possibly have any application, as the United States Shipping Board Emergency Fleet Corporation was of course a corporation. By the same reasoning the cases of *Molina* v. *Comision,* 91 N. J. L. 382, and 92 N. J. L. 38, cited under another Point in plaintiff-in-error's brief, have no application as the Comision was a corporation and before the court.

To paraphrase a famous remark, the plaintiff-in-error's position can be described as "A Corporation! A Corporation! My Kingdom for a Corporation."

POINT VI.

Since the Supreme Court, Rockland County, New York State, had no jurisdiction to entertain this action when pending there under the decisions of New York State holding an *unrecognized* foreign sovereign immune from process, the removal proceedings could not create jurisdiction in the Federal Court.

Plaintiff-in-error brought this suit in the Supreme Court of New York State, Rockland County, against defendant-in-error, at that time unrecognized by the United States, as a foreign corporation, relying upon decisions of the lower courts, particularly the case of *Wulfsohn* v. *Russion S. F. Soviet Republic*, 202 A. D. 421. Defendant-in-error removed the case to the appropriate federal district court; and shortly thereafter, January 9, 1923, the Court of Appeals of New York, the highest court of the State, reversing the decision of the Appellate Division, *supra*, held squarely that no suit would lie in the courts of New York against a foreign state or government even though unrecognized by our State Department, *Wulfsohn* v. *Russian S. F. Soviet Republic*, 234 N. Y. 372, 138 N. E. 24 (1923). That case completely determined the non-suability of an unrecognized foreign government in the courts of the State of New York as reference to the opinion will show. The following question was certified by the Appellate Division of the Supreme Court to the Court of Appeals:

> "Can the defendant, which has not been recognized as a sovereign state by the United

States government, be sued in the courts of this state as a foreign corporation?" (p. 373);

and was answered in the negative. Andrews, *J.* (p. 375):

"It is said that because of non-recognition by the United States such an action may be maintained. There is no relation between the premise and the conclusion. * * * They may not bring a foreign sovereign before our bar, not because of comity, but because he has not submitted himself to our laws. Without his consent he is not subject to them. Concededly that is so as to a foreign government that has received recognition. (*The Schooner Exchange* v. *McFaddon*, 7 Cranch. 116; *Porto Rico* v. *Rosaly*, 227 U. S. 270; *Oetjen* v. *Central Leather Co.*, 246 U. S. 297; *Underhill* v. *Hernandez*, 168 U. S. 250; *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347; *Ricaud* v. *American Metal Co.*, 246 U. S. 304; *Hassard* v. *United States of Mexico*, 29 Misc. Rep. 511; affd., 173 N. Y. 645; *Mason* v. *Intercolonial Railway*, 197 Mass. 349; *Wadsworth* v. *Queen of Spain*, 17 Q. B. 171; *Vavasseur* v. *Krupp*, L. R. 9 Ch. Div. 351; *Strousborg* v. *Costa Rica*, 44 L. T. 199.) But whether recognized or not the evil of such an attempt would be the same. 'To cite a foreign potentate into a municipal court for any complaint against him in his public capacity is contrary to the law of nations and an insult which he is entitled to resent.' (*De Haber* v. *Queen of Portugal*, 17 Q. B. 171.) In either case to do so would 'vex the peace of nations'. In either case the hands of the state department would be tied. Unwillingly it would find itself involved in disputes it might think unwise. Such is not the proper method of re-

> dress if a citizen of the United States is wronged. The question is a political one, not confided to the courts but to another department of government. Whenever an act done by a sovereign in his sovereign character is questioned it becomes a matter of negotiation, or of reprisals or of war (p. 376).
>
> "* * * The Russian Federated Soviet Republic is the existing *de facto* government of Russia. This is admitted by the plaintiff. Otherwise there is no proper party defendant before the court" (p. 374).

In the instant case, the plaintiff-in-error has made the same allegation (aff. of Oliver, fol. 30): "The defendant, The Government of the United States of Mexico is and at all the times herein mentioned was a foreign corporation. It is a *de facto* government and has never been recognized by the United States of America."

The Court of Appeals in a later case in which the question of right of suit by an unrecognized government was concerned, *Russian S. F. Soviet Republic* v. *Cibrario*, said, 235 N. Y. 255:

> "In *Wulfsohn* v. *Russian Federated Soviet Republic* (234 N. Y. 372) we held that our courts would not entertain jurisdiction of an action brought without its consent against an existing foreign government, in control of the political and military power within its own territory, whether or not such government had been recognized by the United States (p. 257).
>
> "* * * Nor is anything here decided inconsistent with *Wulfsohn* v. *Soviet Republic* (*supra*). Upon the facts in that case, if the defendant was not an existing government it might not be sued. There was no party

> before the court. If it were, as was alleged and admitted, the same result followed not because of comity, but because an independent government is not answerable for its acts to our courts" (p. 263).

These two decisions establish the complete want of jurisdiction of the state courts of New York over suits against foreign sovereign states, for the reasons explained:

> (1) If the unrecognized sovereign is not a *de facto* government, there is no party defendant before the court.
>
> (2) If the sovereign is a *de facto* government, it is immune from suit.

In neither event is there any "suit" to remove to the Federal court, and under the cases hereafter cited the removal proceedings themselves create no jurisdiction in the Federal court.

The Rockland County Supreme Court therefore had no jurisdiction in this action and would of necessity have ordered a dismissal of the motion had it been made while the "case" was pending in that court. It is submitted that upon removal to the District Court, the latter acquired no more jurisdiction, *i. e.*, power to hear and determine the alleged issues and render judgment therein, than the state court had. In this sense the "jurisdiction" of the District Court was derivative and secondary. Its power to hear and determine the "case" was absolutely limited by the powers of the court of origin, and these powers were exactly nil, as determined in the *Wulfsohn* case, *supra*.

The doctrine of the derivative and limited jurisdiction of the Federal courts in cases removed from the state courts is an integral and firmly established part of the Federal jurisprudence. Even if the Federal court to which the case is removed would have had jurisdiction over the subject-matter of the action if the suit had originally been instituted in the Federal court, the latter nevertheless has no "jurisdiction" if the state court from which the case was taken on removal had none.

Lambert Run Coal Co. v. *Baltimore & Ohio Railroad Company*, 258 U. S. 377, 66 L. ed. 671, 42 Sup. Ct. Rep. 349 (1922). Plaintiff here began an action in the State Court of West Virginia to compel defendant to distribute its interstate railroad cars in accordance with the requirements of the Interstate Commerce Act. The action was removed to the District Court and defendant moved to dismiss on the ground that the State Court was without jurisdiction of the action. When the case came before the Supreme Court on appeal, a dismissal of the suit was ordered, the Court saying by Mr. Justice Brandeis:

> "As the state court was without jurisdiction over either the subject matter or the United States, the district court could not acquire jurisdiction over them by the removal. The jurisdiction of the Federal Court on removal is, in a limited sense, a derivative jurisdiction. If the state courts lacks jurisdiction of the subject-matter or of the parties, the Federal Court acquires none, although it might in a like suit, originally brought there, have had jurisdiction. *Courtney* v. *Pradt*, 196 U. S. 89, 92, 49 L. ed. 398,

25 Sup. Ct. Rep. 208; *American Well Works Co.* v. *Layne & B. Co.*, 241 U. S. 257, 258, 60 L. ed. 987, 36 Sup. Ct. Rep. 585" (p. 382).

Manufacturers Land & Imp. Co. v. *U. S. Shipping Board E. F. Corp.*, 284 Fed. 231 (C. C. A., Third Circuit, 1922):

> "The Fleet Corporation filed a motion to dismiss the writ of error on the ground that the District Court was without jurisdiction because the New Jersey Supreme Court from which the cause was removed was without jurisdiction, for the reason that the United States, which may not be sued without its consent, is the real party in interest, and not the Fleet Corporation; that the United States has not given its consent to be sued in the state court, and consent is not conferred by removal. If this contention can be sustained, it is dispositive of the case, and it should therefore be considered before coming to the merits of the case" (p. 233).

Goldstein v. *New Orleans*, 38 Fed. 626 (Circuit Ct., La.). Action was commenced in the state court of Louisiana and removed to the Federal court. The court held that as the state court had no jurisdiction over the defendant because the action was not brought in the proper parish, therefore it, the Federal court, acquired no jurisdiction on removal.

> "As the city of New Orleans made no appearance whatever in the district court of Jefferson parish, it follows conclusively that the jurisdiction of that court never attached. The cause, notwithstanding the citizenship of the parties, is one which could not have been instituted in this court as not being within our original jurisdiction. Whatever

> jurisdiction we may now have is based on the removal acts of congress, by which the cause is brought here in exactly the same condition as to jurisdiction over parties it had in the state court,—no better, no worse. As the jurisdiction was defective in the state court, it was defective when the cause came here by removal" (p. 628).

Fidelity Trust Co. v. *Gill Car Company,* 25 Fed. 737 (Circuit Ct., Ohio), was an action similarly begun in a state court and removed. The court, although expressly recognizing that as a Federal court it would have had jurisdiction had the action, one in equity to foreclose a mortgage, been originally instituted therein (p. 738), held explicitly that as the state court had no jurisdiction over the subject-matter, there was no "suit" or "case" to remove and consequently no jurisdiction.

> "The opinion I wish to express is confined to this: that wherever there is a total absence of jurisdiction over the subject-matter in the state court, so that it had no power to entertain the suit in which the controversy was sought to be litigated in its then existing or any other form, there can be no jurisdiction in the federal court to entertain it on removal although in some other form it would have plenary jurisdiction over the case made between the parties. This is not a mere technical necessity of the situation, but a matter of substantial right, which demands that before a defendant can be required to submit his case to any court the legal methods of procedure appointed by law must be pursued in constructing 'the suit', which is made the vehicle for bringing the controversy into court" (p. 739).

See to the same effect:

Earles v. *The German Co.*, 265 Fed. 718 (D. C. Ala.).
Auracher v. *Omaha R. Co.*, 102 Fed. 1 (C. C. La.).
Crowley v. *Southern Ry. Co.*, 139 Fed. 851 (C. C. N. D. Ala.).
Swift v. *Philadelphia & R. R.*, 58 Fed. 858 (C. C. N. D. Ill.).
Lehigh Va. R. Co. v. *Rainey*, 99 Fed. 596 (C. C. E. D. Penn.).
Sheldon v. *Wabash R. Co.*, 105 Fed. 785 (C. C. N. D. Ill.).
Utah Constr. Co. v. *St. Louis Constr. Co.*, 254 Fed. 321 (D. C. N. Mexico).
Southern Bridge Co. v. *U. S. Shipp. Bd. E. Fl. Corp.*, 266 Fed. 747 (D. C. S. D. Ala.).
Black's Dillon on Removal, Sec. 207.
Lewis—Removal of Causes, Sec. 39-A, p. 145.

The Supreme Court of Rockland County having no jurisdiction herein, under the ruling of the *Wulfsohn* case, the District Court likewise had no jurisdiction and the motion to dismiss was properly granted.

POINT VII.

The Government of the United States of Mexico has not by any act waived its immunity from suit, or consented to the exercise of jurisdiction, or appeared generally herein, but on the contrary has at each stage of the proceedings protested to the jurisdiction of the Court and asserted its right to immunity as a sovereign.

This is in answer to Point VI of the brief of the plaintiff-in-error, based upon the fourteenth assignment of error.

The planitiff-in-error contends that certain acts of the defendant-in-error constituted a general appearance in the action. The principal acts they rely upon are the securing of two orders extending time and the securing of consent from the then attorneys for the plaintiff-in-error extending the time of the defendant-in-error. The judge below in his opinion stated in respect to this feature of the case (fols. 180, 181):

> "The only remaining obstacle to granting the relief asked by defendants, is the contention that jurisdiction has been acquired through a general appearance herein upon the part of their attorneys (fol. 181). Without detailing the reservations made by such attorneys upon the occasions upon which they have come into court, their clear intendment, when fairly construed, is that the appearance was special and designed to raise the question of immunity presented by their motions.
>
> "Even upon the questions of appearance, the court is more concerned with substance than with form".

The defendant-in-error was very scrupulous in protecting its rights and in taking every

measure of precaution to avoid doing anything which might in any way prejudice or impair its full rights in protesting to the jurisdiction of the court. On November 2, 1922, which was before the defendant-in-error was required by the rules of the New York Supreme Court to appear in the action, the defendant-in-error, by its attorneys, Hardin & Hess "appearing herein specially solely for the purpose of making this application and not appearing generally herein" (fol. 138), obtained an order to show cause why the action should not be dismissed on the ground, as stated in the affidavit of Jerome S. Hess (fol. 140), "that said defendant is a friendly foreign sovereign nation, which respectfully requests the court to grant it that immunity from process which international usage accords under such circumstances"; and, at the outset of said affidavit appears the following statement: "Deponent represents the United States of Mexico herein *solely* for the purpose of this application and without appearing generally herein or submitting said defendant to the jurisdiction of this court." When this motion came on to be heard, the plaintiff-in-error applied to the court for an adjournment of the hearing; and, as the court granted an adjournment to a day beyond the time when under the rules and practice of the New York Supreme Court defendant was obliged to appear, it was deemed expedient in order to avoid default to procure an order extending "the time of the defendants to appear herein or to make any motion with respect to the jurisdiction of this court or the service of the summons herein" (fol. 145). This order was made upon

the affidavit of Jerome S. Hess, which stated that the firm of Hardin & Hess appeared specially on behalf of the defendant "for the purpose of procuring the annexed order and does not appear generally herein" (fol. 146); and that "Deponent, as attorney for the defendants, may desire in case the aforesaid motion is denied to make various motions in respect to the jurisdiction of the court over the defendants, and the subject matter of the action, and also with respect to the regularity of the service of the summons herein" (fols. 146-7).

In the meantime it was decided that the Federal tribunal, considering the international character of the litigation and the political questions which were involved, was the proper forum. Thereupon, the Government of the United States of Mexico "appearing herein specially solely for the purpose of this application and not appearing generally herein, and protesting to the jurisdiction of this Court" filed a petition for the removal of the action from the New York Supreme Court to the Federal District Court (fol. 20). Under the rules, the time of the defendants to appear generally would not expire until January, 6, 1923.

The plaintiff-in-error is entirely incorrect in stating that the time of the defendant-in-error to "plead" would expire at that time. No complaint had ever been served or ever has been served in this action, and, therefore, the time of the defendant-in-error to "plead" has not even started to run. Prior to January 5, 1923, the attorneys then acting for the plaintiff-in-error made a stipulation extending the time of the defendants "to appear specially herein for the

purpose of raising any objection which the defendants or either of them may desire to raise to the jurisdiction of the court." This stipulation and the order entered thereon extended the time of the defendant-in-error to appear specially until the 13th day of January (fol. 144). Prior to that time and on January 12, 1923, an order was obtained from Judge Knox by Hardin & Hess, "protesting to the jurisdiction of this honorable court, appearing specially and not otherwise for the defendant, The Government of the United States of Mexico, for the purpose of securing this order and contesting the validity of the summons herein, and the jurisdiction of this Court, both over the cause of action and over the person of the said defendant" (fol. 61), requiring the plaintiff to show cause why the action should not be dismissed "upon the ground that said defendant is a *de facto* government of an independent foreign sovereign nation, and, therefore, is immune from process of the courts except upon its consent" (fol. 61). In the order to show cause Judge Knox provided that the time of the defendants to appear or make any motion with respect to the jurisdiction of the court be extended until five days after the entry of an order upon the motion. The affidavit upon which the order to show cause was obtained stated that Hardin & Hess had appeared specially in the New York Supreme Court and "have not in any manner appeared generally herein. Said firm applies for the annexed order to show cause, appearing specially for that purpose, * * * and does not appear specially or generally in the action, nor waive any jurisdictional defects in the proceedings by which the plaintiff has sought

to acquire jurisdiction of the defendant herein, nor waive any jurisdictional defects with regard to the cause of action alleged herein" (fol. 63).

Throughout every one of the papers in the action, defendant-in-error and its attorneys have taken every means in their power to indicate precisely and fully that the defendant-in-error was contesting and protesting to the jurisdiction of the court over this action, and that it did not waive any of its rights but was appearing specially for the sole purpose of presenting to the court the issues raised by its protest to the jurisdiction and its assertion of its sovereign immunity.

It has been decided in two federal cases that appearances of the kind made by the defendant-in-error in this case do not constitute general appearances and are not a waiver of its right to object to the jurisdiction of the court or to assert its immunity. There is no other manner in which the defendant-in-error could have preserved its right to raise these questions at the first appropriate occasion, which it did do.

Yanuszauckas v. *Mallory S. S. Co.*, 232 Fed. 132 (C. C. A., 2nd Cir., 1916), contains language showing that the position of the defendant-in-error in the instant case is entirely correct. The court said:

> "The defendant asserted this position at the earliest moment by moving to dismiss and appearing for that purpose only. The application for an order extending the time to plead generally in case it should be held that the suit was properly brought in the Eastern district, cannot be regarded as a waiver of the position taken in the motion to dismiss. It was only a wise precaution

> to enable the defendant to defend on the merits if the jurisdiction in the Eastern district should be upheld. The judge simply said, in effect, that if he found that the action was properly brought in the Eastern district he would permit the defendant to answer and defend on the merits. To assert that the defendant was compelled to accept a situation which might result in a default being taken against him while the court was considering its rights is both illogical and unfair" (p. 133).

In *Kuzma* v. *Witherbee, Sherman & Co.,* 232 Fed. 286 (D. C., E. D. N. Y.) Judge Chatfield said:

> "The defendant has obtained an extension of time to answer pending the determination of these motions. See *Murphy* v. *Safe Co.* (C. C.) 184 Fed. 495. He appeared specially, and the order recites that fact, as well as stating that the extension is without prejudice to the motion. The affidavit of merits under these circumstances is not a waiver of jurisdiction over the person, nor does it make the special appearance void" (p. 287).

The plaintiff-in-error seeks to distinguish the case of *Waters* v. *Central Trust Company,* 126 Fed. 469. In that case a petition for removal from the state court to the Federal court had been filed on the last day for filing an answer. The learning on the petition for removal was adjourned and thereupon the attorney that appeared for the defendant stated that if an adjournment was given the time of the defendants to plead ought to be extended accordingly, and upon an oral application an order was placed upon the original journal extending the time to plead The court said:

> "We are of the opinion that, under the circumstances, this taking of an extension of time to plead did not constitute a voluntary general appearance, such as would subject the defendant to the jurisdiction of the Ohio court (p. 470). * * * It is well settled that an application for an extension of time ordinarily amounts to a voluntary general appearance and a submission to the jurisdiction of the court, because the circumstances show a waiver of the right to question such jurisdiction. But if the facts show that such application is made solely in order to preserve the right of a party to deny such jurisdiction, there is no reason to presume that waiver of such right or an intent to submit to such jurisdiction" (p. 471).

The language of the court in this case exactly fits the situation of the defendant-in-error in the instant case. Each one of the extensions referred to in the brief of the plaintiff-in-error was obtained for the purpose of presenting to the court the objection to its jurisdiction, were so worded, and recited the special appearance of the attorneys for the purpose.

Under the rule in the New York courts appearances such as those of the defendant-in-error do not constitute general appearances. It has been held, *Wood* v. *Furtick*, 17 Misc. 561, that a motion to set aside an attachment, although it does not qualify the appearance, does not constitute a general appearance in the action. *Duimo* v. *Arbuckle*, 166 A. D. 86, holds that the general appearance of a defendant in an action cannot be made in any other manner than that prescribed by Sec. 421 of the Code of Civil Procedure. *Cutting* v. *Jessmer*, 101 A. D. 283, holds

that any appearance other than that specified as a general appearance by Sec. 421 of the Code of Civil Procedure is a special appearance. *Engels Express Co.* v. *Ferguson*, 79 Misc. 40, held that endorsing the name and office address of the attorney for defendant upon a bond filed to obtain the release of a levy of attachment did not constitute a general appearance. In *Riegelman* v. *South Shore Traction Co.*, 67 Misc. 590, it was held that service of an order to show cause why an injunction granted upon plaintiff's application should not be vacated was not equivalent to a general appearance in the action. In *Noble* v. *Crandall*, 49 Hun. 474 it was held that the service of a notice of motion to set aside a judgment was not a general appearance, although the notice of motion was not qualified in any way. In *Paine Lumber Company* v. *Galbraith*, 38 A. D. 68, it was held that the obtaining of four extensions of time for the defendants to answer, signed not only by the attorney for the plaintiff, but by an attorney purporting to sign on behalf of the defendants, did not constitute an appearance.

We respectfully submit that the rule as laid down in the New York State reports and in the cases decided in the Federal courts, is that where the defendant by its acts has demonstrated a determination to bring before the court at an early and appropriate occasion the question of the jurisdiction of that court, no acts of the defendant or its attorneys have been or ever will be considered as a general appearance in the action, provided said acts have clearly kept before the court the purpose for which they were done, and were instituted solely for the purpose

of preserving the status of the defendant so as to enable it to make its plea to the jurisdiction. Upon all the authorities and upon the evidence in the record the defendant-in-error used every appropriate means in its power to avoid submission to the jurisdiction of the court and to avoid in any way waiving its right to object to the jurisdiction on all appropriate occasions.

CONCLUSION.

The United States of Mexico has not asserted its sovereign rights in this suit solely to vindicate a point of national honor, nor to invoke a convention of international courtesy. Its national rights have been seriously invaded and its interests prejudiced. Plaintiff-in-error has endeavored and threatened to seize all of its public property in the State of New York and has sought to embarrass and harass its public agents in carrying on their official functions.

In sustaining the claim of immunity set up by the Republic of Mexico, the District Court of the United States has appropriately, in our opinion, seen fit to protect those interests of the Mexican State which international usage and the courtesy between nations prescribe.

We respectfully request this Honorable Court to continue that protection, by dismissing the writ of error.

Respectfully submitted,

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WM. R. ST

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1923.

No. 662.

THE OLIVER AMERICAN TRADING COMPANY, INC.,
Plaintiff-in-Error,

against

THE GOVERNMENT OF THE UNITED STATES OF MEXICO AND NATIONAL RAILWAYS OF MEXICO,
Defendants-in-Error.

REPLY BRIEF OF THE PLAINTIFF-IN-ERROR.

ROBERT F. GERACEN,
ALFRED HAYES,
Counsel for Plaintiff-in-Error.

CHARLES WATSON RUSSELL, Printer

Supreme Court of the United States

OCTOBER TERM, 1923.

THE OLIVER AMERICAN TRADING COMPANY, INC., Plaintiff-in-Error, AGAINST THE GOVERNMENT OF THE UNITED STATES OF MEXICO AND NATIONAL RAILWAYS OF MEXICO, Defendants-in-Error.	No. 662.

REPLY BRIEF OF THE PLAINTIFF-IN-ERROR.

REPLY TO DEFENDANT'S POINT I.

The writ of error is properly taken direct to the Supreme Court under Section 238 of the Judicial Code. The action was dismissed for want of jurisdiction over the person of the defendants and was so certified by the District Judge. The distinction relied upon by the defendant does not apply where the question involved is as to the acquisition of jurisdiction over the person.

The order under review was secured by the defendant, purporting to appear specially, moving for dismissal of the action on the ground that the defendant was immune from service of process and for the vacating and setting aside of the alleged service.

This is precisely the basis upon which direct appeal was allowed in the case of *G. C. Merriam Company* v. *Saalfield*, 241 U. S. 22 (1916), where a decree was founded upon substituted service on alleged attorneys in Ohio. Pitney, *J.*, citing a large number of cases, says:

> "But the distinction referred to bears upon the nature of the jurisdiction exercised or refused to be exercised after a valid service of process upon the defendant, and does not affect the question whether the court has acquired jurisdiction over the person, which is the one here involved. This question may be reviewed on direct appeal."

De Rees v. *Costaguta*, 254 U. S. 166 (1920) expressly recognizes this distinction in the paragraph of Mr. Justice Day's opinion immediately preceding that cited by the defendant as follows:

> "Since the decision of *Shepard* v. *Adams*, 168 U. S. 618, it has been the accepted doctrine that where there is a contention that no valid service of process has been made upon the defendant, and the judgment is rendered without jurisdiction over the person, such judgment can be reviewed by direct appeal to this court. This principle was restated and previous cases cited as late as *Merriam & Co.* v. *Saalfield*, 241 U. S. 22, 26."

Direct appeal where immunity was claimed in admiralty for a trading vessel owned by a foreign power was held proper in *The Pesaro*, 255 U. S. 216 (1921). Mr. Justice Van Devanter said that there was a jurisdictional question under section 238 "because it directly concerned the power of the District Court as defined by the laws of the United States to entertain and determine the suit." He points out that section 24 of the Judicial Code gives to the District Court jurisdiction of all civil causes of admiralty and maritime jurisdiction. The same section gives jurisdiction of controversies between citizens of a state and foreign states. In both cases it is claimed that for some reason a suit coming within the language of the statute is not of that character. In both cases the basis of the contention is an alleged immunity. In *The Pesaro* the immunity claimed is of the res. In the case at bar the immunity claimed is of the person. The same question was similarly decided in the *Carlo Poma*, 255 U. S. 219 (1921).

In the case of *Rosenberg Brothers & Company* v. *Curtis Brown & Company*, 260 U. S. 516, a summons having been quashed on the ground that the defendant was not amenable to the process of the state court prior to removal, it was held that review should be had by direct appeal under section 238.

The question of the court of review was carefully considered by the counsel for the plaintiff before the writ of error was applied for and it is clear that appeal to the Circuit Court of Appeals would meet with the same fate as that directed by this Court in the *Carlo Poma* case.

REPLY TO DEFENDANT'S POINT II.

The order appealed from is an absolute and unqualified refusal of the Federal Court to exercise jurisdiction over any foreign sovereign. The plaintiff cannot resist removal and the necessary effect is a complete denial of judicial relief.

The position of the plaintiff-in-error is set forth in Point II. of its own brief (pp. 29-30). Its contention is that for a court of general jurisdiction to dismiss without reference to the character of the action on the mere ground of the status of the defendant, thus conferring absolute immunity, is to confer a special privilege in favor of a particular debtor, inconsistent with the Federal Constitution.

REPLY TO DEFENDANT'S POINT III.

No case has been cited by the defendant and it is believed that none has been decided either in the United States or England, holding that a foreign sovereign regularly transacting business within the jurisdiction has immunity for commercial transactions.

So far as counsel are aware there is no decision either in the United States or in England, allowing immunity where a foreign sovereign maintained an office for trade within the jurisdiction. The recital on page 3 of the defendant's brief of the levies of the attachment show how completely and in what varied forms prop-

erty of the defendant has been mingled with the general property of the community in the arteries of trade. If real property of a foreign government is not immune, and if the admiralty courts hold that a government owned trading vessel coming temporarily within the jurisdiction of suit thereby subjects itself to the ordinary obligations of traders, there is no reason why the regular transaction of business should not constitute a like submission to the burdens borne by all nationals.

The defendant ignores entirely the fact that immunity, at least as to certain commercial transactions, is refused by the courts of Belgium, France, Holland, Italy, Russia and Switzerland.

The plaintiff-in-error reiterates that the earliest decision allowing immunity in trade was that of the Parlement Belge, decided in 1880, which concerned a mail packet and while the court did not base its decision upon the unratified postal convention of 1876 which was urged upon the court's attention it must not be overlooked that the treaty in fact provided that these vessels "should be considered, and treated in the port of Dover and in all over British ports at which they may accidentally touch, as vessels of war and be there entitled to all the honours and privileges which the interest and the importance of the service in which they are employed, demand."

It was not until 1906 that *The Jassy,* L. R. (1906), 270, held that an admiralty action *in rem* would not be allowed for damages by a collision in territorial waters of Roumania with a vessel owned by the State of Roumania and employed for public purposes in connection with

the National Railways in Roumania. Many of the recent cases grew out of the great war and were undoubtedly affected by the desire of the courts not to hamper its prosecution.

Two decisions in cases involving immunity were handed down by the Supreme Court on February 18, 1924. In the *Gul Djemal No.* 83, October Term, the decision of Judge Knox denying immunity was affirmed not, however, upon the general grounds upon which he had placed the decision of non-immunity of a trading vessel owned by a government with which diplomatic relations had been severed, but upon the ground that immunity could not be claimed by the master of the vessel. *In the Matter of Transportes Maritimos do Estado, No. 26* original, prohibition was denied. Mr. Justice McReynolds states that plainly the trial court had obtained jurisdiction over the res and that it had power to consider and pass upon both the form and substance of any objection to its jurisdiction, and that there was a plain way to review in the Supreme Court.

In order that no important cases should be overlooked the Court should note that case No. 3 in the case cited in the plaintiff's brief as *The Gloria* was that of the *Kingdom of Norway* v. *The Federal Sugar Company,* 186 Fed. 188 in which it was held that a counterclaim would not be restricted to set off. An opposite position has been taken by the Circuit Court of Appeals in the 9th Circuit *In re Patterson MacDonald Shipping Board Company,* 293 Fed. 192 (1923), which was a petition to revise an order relative to the claim of the Commonwealth of Australia

in bankruptcy proceedings in which it was held that there was no power to render a judgment in such proceedings against the foreign sovereign state.

REPLY TO DEFENDANT'S POINT IV.

The point urged that the courts of one country will not sit in judgment upon the acts of the government of another within its own territory is a defense on the merits and cannot be urged in support of the order under review. Such defense should not be applicable to breach of a commercial contract.

It is clearly pointed out both in the *Ricaud* and *Molina* cases, cited in both briefs, that to pass upon such a point is to exercise jurisdiction and not to deny it. It can only be dealt with properly when all the facts are brought out upon the trial of the action.

For the defendant to raise this point and to insist, as it does on page 17 of its brief, that the dismissal was on the ground that the court had no jurisdiction either over the person or the subject matter of the action is a complete confirmation of the plaintiff's contention that the defendant has appeared generally by failing to confine itself to the only contention which is permissible under a special appearance, namely, that there was no jurisdiction over the person.

In *Fred S. James & Company* v. *The Second Russian Insurance Company,* as yet unreported, decided February 20, 1924, in the Appellate Division, Supreme Court, New York, First De-

partment, it was held that an action was maintainable against an insurance company which had been nationalized by the Soviet Government. A motion to dismiss on the ground that the court had not jurisdiction of the person or subject matter was denied and such order affirmed. It was contended that, as the plaintiff was an assignee from a British corporation, and by the agreement between the British Government and the Soviet Government the decrees of the Soviet Government had been recognized and the debts of nationals were to be settled by diplomatic negotiations, there was no jurisdiction of the subject matter. It was held that this question could be raised only in defense of the action, and not by the motion to dismiss for the want of jurisdiction.

REPLY TO DEFENDANT'S POINT V.

The plaintiff dealt with and served process upon officers of the National Railways of Mexico (Government Administration). The plaintiff is dominus litis and determines whom to sue. Plaintiff's Point VII fully sets forth the facts and law relative to the Government Administration.

It is true that the *Wulfsohn* cases cited by plaintiff, dealing with the question as to whether such Government Administration is a suable body were reversed, but not upon the ground which weakened the opinions below, so far as they dealt with the nature of a foreign public corporation, and this can also be said of the similar

opinion in the case of *Nankivel* v. *Omsk Government*, 237 N. Y. 150 (1923), in which in the opinion below by Judge Page in 203 Appellate Division 740 (1922) the cases as to the nature of public corporations are dealt with.

The civil law countries generally make no such sharp distinction as to the existence of a corporate entity as is common in Anglo-Saxon Law. Certain unreported cases have come to the attention of plaintiff's counsel in which jurisdiction was taken in Mexico of civil actions against National Railways of Mexico (Government Administration). *Gutierrez and Josef Espejal against the National Railways of Mexico Government Administration* (April 3, 1922), was an action for death by wrongful act in which the suit was admitted and the defendant answered through its director Llano, who denied the right of the parents to represent the sons. Both the 3rd Supernumerary Court and the Tribunal on Appeal of the First Circuit absolved the railroads. The action of *Hadad* v. *National Railways of Mexico, Administered by the Government* (Sept. 11, 1922), was brought to recover the value of lost merchandise. The defense was a denial and plea of the expiration of time limitation and was sustained both by the Second Supernumerary Court and on appeal by the Tribunal of the First Circuit, but there appears to have been no contention that the defendant was not a suable entity or that it had any immunity.

REPLY TO DEFENDANT'S POINT VI.

The Supreme Court of the State of New York is a court of general jurisdiction and whether a foreign sovereign is immune in an action for breach of contract is a question of general law upon which the Federal Court will make its own determination.

The argument of the plaintiff of this question is set forth in sub-division 2 of its Point V. (plaintiff's brief, pp. 113-115).

REPLY TO DEFENDANT'S POINT VII.

Whether the Government of the United States of Mexico has submitted to the jurisdiction is not dependent upon any local rule. In fact the New York statute as to appearance, prescribes the condition upon which a party secures the rights flowing from appearance but does not affect the question of submission to jurisdiction by conduct.

The New York Civil Practice Act, Section 237, provides that a defendant's appearance must be made by serving a notice of appearance, a copy of an answer or a notice of motion, raising an objection to the complaint in point of law. This is similar to the provisions in force, prior to 1920, in section 421 of Code of Civil Procedure. There has been some confusion in New York decisions as to the effect of the statute. In *Metal Shelter Company* v. *Fosdick,* 172 N. Y. Supplement 273 (1918), it was held that where the defendant opposes an injunction he submits

himself to the jurisdiction of the court although he has made no appearance within the Code of Civil Procedure, Section 421. Hotchkiss, *J.*, says:

> "An act constituting an appearance within the meaning of Section 421 is necessarily one sufficient to confer jurisdiction if that has not already been acquired, but the converse is not true. An act may subject a defendant to the jurisdiction of the court, or cure defective process and thus be 'deemed' an appearance in the sense of a submission to jurisdiction although it may not be an appearance under Section 421 such as to confer upon the defendant the peculiar rights incident thereto."

In *Matter of Atterbury,* 222 N. Y. 355 (1918), (cited plaintiff's brief 132) an appearance characterized as special was held general because of general opposition to the motion. The order under review was upon a motion to vacate an order fixing the compensation of an attorney on the ground that the guardian of certain infants was a necessary party. The Court of Appeals sustained the denial of the motion to vacate. Judge Andrews says, referring to the guardian: "It appeared upon the said motion and it opposed that motion upon all the grounds here argued and asked that it be denied. That, although it stated that it appeared specially, was a general appearance on the motion. It was so treated in the recitals contained in the order." In *Paine Lumber Co.* v. *Galbraith,* 38 App. Div. 68 (defendant's brief, p. 67) it was held that the

securing of an extension did not prevent the service of an answer by another attorney. Willard Bartlett, *J.*, says:

> "While the act of Mr. Bloomfield in subscribing himself as attorney for defendants may have sufficed to operate as a waiver by defendants of irregularities or even as an affirmative submission to the jurisdiction of the court, under the authority of *Douglas* v. *Haberstro* (8 Abb. N. C. 230), and like cases, it was not an appearance which prevented the service of an answer signed by another attorney without substitution."

CONCLUSION.

The principle which defendant urges, of inability to claim a legal right against the national sovereign is applicable only within its own territorial jurisdiction. We share no sovereignty within the United States with any other ruler. When a foreign sovereign comes within our domain, its sovereignty becomes subordinate to ours, and it necessarily submits to such conditions for holding property and transacting business as we may prescribe.

The plaintiff believes that in seeking legal redress for the violation of its contracts it interferes with no international usage or courtesy, much less with any legal right of the Government of Mexico to ask the courts of the United States to abnegate its territorial jurisdiction. At the request of Mr. Hughes the plaintiff voluntarily released the property of the Mexican Consulate,

which at the time of such release had no legal immunity. The only embarrassment and harassing referred to in defendant's Conclusion was self-imposed and was brought about through its misguided belief that the State Department should illegally interfere and be the determining agency in this action.

The plaintiff asks this court for reversal, in the conviction that the protection of its own legal rights, a wise business policy, sound political considerations and the law of the land require that where a foreign government engages in business, mingling large amounts of property in the common channels of business, it shall be subject to the judicial power of the nation, on equal terms with an American citizen.

Respectfully submitted,

Robert F. Greacen,
Alfred Hayes,
Counsel for Plaintiff-in-Error.

OLIVER AMERICAN TRADING COMPANY, INC. *v.* GOVERNMENT OF THE UNITED STATES OF MEXICO AND NATIONAL RAILWAYS OF MEXICO.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 662. Argued March 13, 1924.—Decided April 7, 1924.

1. On a jurisdictional review under Jud. Code, § 238, the District Judge's certificate of a jurisdictional question does not relieve this Court of the duty of determining for itself whether the question certified is one of the jurisdiction of the lower court as a federal court. P. 442.
2. Where an attachment suit in New York against the Government of Mexico was removed to the District Court and dismissed for lack

of jurisdiction upon the ground of sovereign immunity, *held*, that a writ of error from this Court would not lie under § 238, since the question was one of general law, applicable to state and federal courts alike; and that the case should be transferred to the Circuit Court of Appeals under Jud. Code, § 238(a). P. 442.
Case transferred to Circuit Court of Appeals.

ERROR to a judgment of the District Court dismissing, for want of jurisdiction, an action by attachment against the Government of Mexico, removed from a court of New York.

Mr. Alfred Hayes, with whom *Mr. Robert F. Greacen* was on the briefs, for plaintiff in error.

Mr. Jerome S. Hess, with whom *Mr. Harold B. Elgar*, *Mr. Ernest Angell* and *Mr. George F. Snyder* were on the brief, for defendants in error.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

The Oliver American Trading Company, Inc., a Delaware corporation, brought this suit, in the Supreme Court of New York, against the United States of Mexico and the National Railways of Mexico. Service was made by attaching tangible personal property and credits within the State alleged to belong to the defendants and summons. In the state court, the Government of Mexico, appearing specially, moved seasonably that the attachment be quashed and that the suit be dismissed. Before the motion was heard, the case was removed on its petition to the federal court for southern New York. There, Mexico, again appearing specially, procured a rule that the plaintiff show cause why the attachment should not be vacated and the suit dismissed, upon the ground that it is "an independent sovereign nation, . . . immune from process of the courts, except upon its consent."

The plaintiff asserted that at the time when the suit was begun and when the rule was returnable Mexico had not been recognized by our Government; and contended that, being a non-recognized foreign government, it was suable as a foreign corporation under subdivision 7 of § 7 of the Civil Practice Act of New York. It was conceded that National Railways of Mexico is merely a name for the system of railroads controlled and operated by the Mexican Government. After the hearing on the motion, but before entry of the judgment below, Mexico was duly recognized by the United States and diplomatic relations between the two governments were resumed. Thereupon, and solely upon this ground, the District Court held that Mexico was entitled to immunity from suit in the courts of the United States of America, unless upon its own consent; granted the motion to vacate the attachment and dismiss the suit; and issued the certificate of a jurisdictional question provided for in § 238 of the Judicial Code. Here, the defendants in error move to dismiss this writ of error for want of jurisdiction in this Court, on the ground that the case below did not present the question of jurisdiction of the district court as a federal court.

The fact that the District Judge issued the certificate does not relieve this Court from the duty of determining for itself whether the question which was certified is in truth one of the jurisdiction of the lower court as a federal court. *Bogart* v. *Southern Pacific Co.*, 228 U. S. 137, 144; *Smith* v. *Apple, ante* 274. Such a question is presented whenever there is in controversy the power of the court, as defined or limited by the Constitution or statutes of the United States, to hear and determine the cause. *The Pesaro,* 255 U. S. 216, 218. It is not presented where the question of jurisdiction to be decided turns upon matters of general law applicable alike to actions brought in other tribunals. *De Rees* v. *Costaguta,* 254 U. S. 166, 173. The question of sovereign immunity is such a question of gen-

eral law applicable as fully to suits in the state courts as to those prosecuted in the courts of the United States.[1]

As the writ of error from this Court was improvidently allowed, the case must be transferred to the Circuit Court of Appeals for the Second Circuit. Section 238(a) of the Judicial Code, Act of September 14, 1922, c. 305, 42 Stat. 837.

Case Transferred.